

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PLEASRDAO, an exempted
foundation company,

Plaintiff,

-against-

MARTIN SHKRELI,

Defendant.

: 24-CV-4126(PKC)

: United States Courthouse
: Brooklyn, New York

: August 23, 2024
: 10:00 a.m.

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TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: REED SMITH LLP
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New York, New York 10022
BY: STEVEN COOPER, ESQ.
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REPORTED BY:

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Computer-Aided Transcription.

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Kristi Cruz, RMR, CRR, RPR
Official Court Reporter

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1 (In open court.)

2 THE COURTROOM DEPUTY: Civil Cause For a
3 Preliminary Injunction Hearing, docket number 24-CV-4126,
4 *PleasrDAO v. Shkreli*.

5 Will the parties please state their appearances
6 for the record, starting with the plaintiff.

7 MR. COOPER: Good morning, Your Honor.
8 Steven Cooper, Reed Smith, for the plaintiff.

9 THE COURT: Good morning.

10 MR. CARNES: Good morning, Your Honor.
11 Rob Carnes for the plaintiff.

12 THE COURT: Good morning to you, as well.

13 MR. DYKEMA: Good morning, Your Honor.
14 Erik Dykema for the defendant, Mr. Shkreli.

15 THE COURT: Good morning.

16 MR. KRIMNUS: Good morning, Your Honor.
17 Serge Krimnus, Bochner PLLC, for defendant.

18 THE COURT: Good morning to you, as well.

19 So we're here nominally for a preliminary
20 injunction hearing. But as I clarified in the docket order
21 issued yesterday, I'm not anticipating or requesting that
22 any evidence be produced, but rather I want to hear argument
23 on the relevant factors relating to the request for a
24 preliminary injunction.

25 This is how we're going to proceed. I'm going to

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1 let the plaintiff obviously begin because it's your motion,
2 and the focus should be on irreparable harm, because the
3 defendant has only argued that issue in the written
4 submissions and quite frankly, Mr. Dykema, I do view the
5 defendant as having waived argument about the other factors.
6 I don't think it would be fair for you now to make arguments
7 on the other three factors beyond irreparable harm since you
8 didn't include those in your written submission. So I don't
9 want any, for lack of a better word, sandbagging going on.

10 That being said, of course, I have to consider
11 those factors independently and make a determination before
12 I rule on the motion. But I view you as having forfeited,
13 to an extent, any argument on the three other factors.

14 I will note that one of your arguments on the
15 irreparable harm issue, namely that the album is not a trade
16 secret, borders on an argument about the merits, you know,
17 likelihood of success or the serious question raised by the
18 trade secret claim, or the two trade secret claims. But
19 again, I don't think you can really argue the other three
20 factors, having not submitted anything in writing on those
21 issues. It does appear to me that your focus or your
22 reliance is solely on this irreparable harm issue.

23 So with that opening, let me hear from you,
24 Mr. Cooper, and then of course I'll hear from Mr. Dykema.

25 MR. COOPER: Your Honor, would you like me to use

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1 the podium?

2 THE COURT: No. You know what I'd actually
3 prefer, I know it's a little awkward and it's probably
4 contrary to your habit, but use the microphone and remain
5 seated because it will just make it easier for the court
6 reporter to hear you.

7 MR. COOPER: Okay.

8 THE COURT: And this is going to end up being more
9 of a discussion, if you will, or a debate. So have a seat,
10 use the microphone. Just remember to speak slowly and
11 clearly.

12 MR. COOPER: Okay. I will, Your Honor.

13 Again, good morning, Your Honor. As you pointed
14 out, the only issue with which the defendant took issue was
15 the irreparable harm element. And, interestingly, there was
16 also no refutation of the fact that Mr. Shkreli has copies
17 of the album, that he has broadcast at least parts of the
18 album, and that he made money from the album. And, in fact,
19 there is a YouTube social media discussion/interview with
20 him where he makes some flippant remark about, well, I'll
21 pay the \$6 back or something like that, which we had
22 provided actually in connection with our motion for
23 alternative service.

24 So there seems to be, at least at this point, no
25 question that the factual allegations that we made are

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1 accurate.

2 As we pointed out in our opening brief, this is
3 certainly a unique object. It is novel, it is singular,
4 there's only one copy of it. In fact, the whole point of it
5 goes against the MO of the music industry. The music
6 industry is all about the widest circulation of the music,
7 making the most money based on the most sales. This was a
8 statement the other way. This was a statement against that
9 mentality, against the digital age, creating a singular
10 piece.

11 And as a result, it became quite available. I
12 mean, Mr. Shkreli bought it in the first instance for
13 \$2 million. My client bought it for almost \$5 million. The
14 album, if you recall, has 31 tracks. I want to point out
15 that the album runs over two hours, and I think that's
16 relevant and I'll bring it up a little later as to why these
17 little five-minute snippets do not embody a release of the
18 album. They are little samplers. They're hors d'oeuvres.

19 THE COURT: Five, one-minute samplers all merged
20 together, basically?

21 MR. COOPER: Well, we put out a five-minute
22 sampler of one song. Mr. Shkreli relies on our complaint
23 when he talks about the releases, largely. He does not
24 offer independent evidence of what he released. So it's
25 still somewhat unclear. But again, those weren't refuted.

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1 Mr. Shkreli apparently made certain limited disclosures
2 along the way. But there is no doubt that there has not
3 been a full-throated release of two hours and 11 minutes of
4 this album. And there's no support for that in the record
5 and it's simply not true.

6 And interestingly, you know, when Mr. Shkreli
7 argues in his opposition about the release, because he makes
8 a very big point of the fact that there can be no
9 irreparable harm because it's been released. But if you
10 read it carefully on page 10, he provides caveats. He says
11 release -- limited release, or he says release subject to
12 certain restrictions, in parentheses. He himself is
13 acknowledging any release has been very limited.

14 So in addition to the album, as you know, it had a
15 very ornate case, it had these customized speakers that went
16 with it, and there was a 174-page manuscript that went along
17 with it.

18 THE COURT: Can I ask you a question? And this is
19 somewhat trivial, to be honest. But I notice that maybe the
20 speakers didn't actually convey to your client. Is that
21 incorrect?

22 MR. COOPER: Were they forwarded to the client?

23 THE COURT: Well, no. Did they actually receive
24 them? Because I was comparing the original purchase
25 agreement and then I looked at the agreement which is the

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1 asset purchase agreement docketed at 22-3.

2 MR. COOPER: Right.

3 THE COURT: And I didn't -- and I may have missed
4 it, where the attachment is, the asset list, it doesn't seem
5 to show the speakers.

6 MR. COOPER: I'm not sure if they were actually
7 conveyed. I saw the same thing.

8 THE COURT: Okay.

9 MR. COOPER: It was a complete forfeiture. So if
10 he had them, he would have had to convey them, but I haven't
11 checked on that particular point.

12 THE COURT: Okay. Go ahead.

13 MR. COOPER: So just to wrap up this notion of the
14 uniqueness, the novelty, the value of this piece of art is
15 in its uniqueness and its secrecy. The value is not that
16 it's the greatest record of all time, that it's Frank
17 Sinatra's Greatest Hits or Bruce Springsteen's Born to Run.
18 People don't know what's in there. What makes it so
19 valuable and so interesting is the fact that people don't
20 know what's in it, the secrecy that's around it. So
21 obviously any disclosure is going to diminish, if not
22 totally eliminate, you know, the value of it.

23 The forfeiture order was a typical clear
24 forfeiture order. Mr. Shkreli was to forfeit all his right,
25 title, and interest in the artwork, in the album. There

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1 were no carve-outs, there were no caveats that he could keep
2 copies. And for him now to argue he was permitted to do
3 this, I would submit to you is another example of his
4 disingenuous conduct and his thumbing his nose at the
5 process. He was supposed to absolutely forfeit everything.
6 And the forfeiture order says including the proceeds, the
7 proceeds from the album. So to the extent he's making any
8 money on this album, it is in violation of the forfeiture
9 order. He was to have no ongoing rights to it.

10 And what he's trying to do is, he's trying to
11 actually profit or benefit twice, because he benefited the
12 first time by having the \$4 million credited towards a
13 \$7.4 million forfeiture order, and now he wants to continue
14 to benefit by keeping copies of it and making money from it,
15 which is obviously totally improper and to some degree it
16 makes a mockery, honestly, of the forfeiture order. If
17 parties can claim they forfeited everything and make
18 representations to that effect in connection with federal
19 criminal court sentencing, yet somehow keep something on the
20 side, keep certain aspects of it, it really makes it very
21 difficult for the U.S. Marshal Service to enforce these
22 orders and to have them have any real meaning.

23 I want to talk a little about the law here.
24 Obviously every case with regard to irreparable harm is
25 different; they're fact-specific. I would submit that this

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1 is the quintessential case where injunctive relief is
2 appropriate. It is certainly a unique object. And when the
3 cases look at irreparable harm, they don't say there's no
4 way to be compensated, because frankly everything can be
5 compensated to some degree with money. It is difficult to
6 compensate or it is not adequate to compensate. And this is
7 certainly an example of that. This is one of a kind. There
8 is no market for this. There's no way to say, oh, Picassos
9 sell for this or that. Even if that was something that
10 didn't cause irreparable harm, there's no market for it.
11 And there are no contracts here. One of the case that
12 Mr. Shkreli relies on is this *Liberty Power* case where the
13 Court denied irreparable harm, but it was because there were
14 already contracts in place that were going to be renewed, so
15 it was very easy to make a calculation that was accurate.
16 Here, there's no way. There's just no way. And there are a
17 lot of ways to commercialize or monetize this asset. This
18 is an NFT digital company. Very much a 2024 type of
19 business. It is, you know, a Cayman-based exempt
20 foundation. This is not your run-of-the-mill company. And
21 what they're doing now, if you saw in the record, is their
22 first way to do it was to create a launch where they allow
23 someone to -- for paying \$1, I believe -- like hear five
24 minutes of the album. And each person who does that reduces
25 the time, the 88-year restriction by like five minutes.

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1 So how much that's going to generate? I mean,
2 there's just no way to know. There's just no way to know.
3 And, frankly, they could go about this a whole bunch of
4 different ways. Have listening parties, private listening
5 parties, et cetera.

6 So difficult? I would say virtually impossible to
7 have an accurate damages award in this situation. So it's
8 certainly unique in that respect.

9 The second way courts find irreparable harm are
10 lost business opportunities. Not just the uniqueness of the
11 object, but a lost business opportunity. The *Tom Doherty*
12 case from the Second Circuit is the leading case of this
13 area. And there the Court granted an injunction with regard
14 to Power Rangers toys where they're found to be essential to
15 the lifeblood of the business.

16 This company is fairly new. They paid almost
17 \$5 million for this art, this album, and it goes to the
18 lifeblood of the business. If you allow Mr. Shkreli to
19 continue in a wholly inappropriate way, improper way to
20 maintain copies and to play them, it diminishes greatly the
21 ability of PleasrDAO to effectuate its business plan as to
22 what it wants to do with this album, why he wants to do the
23 album.

24 In fact, the *Paisley Park* case, which is the case
25 they rely on very heavily, which is the Prince case, two

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1 things I want to say about that. One is that the Court
2 makes clear that it's up to Pleasr, it's up to the agreed
3 party to decide what it wants to do with the product: When,
4 how, where it wants to exploit it, release it. It is not up
5 to, you know, Mr. Shkreli. So allowing him, again, to have
6 these copies impinges on PleasrDAO's ability to make those
7 decisions with it.

8 The second thing is, I think *Paisley Park* supports
9 our side, not their side, even though they rely so heavily
10 on it. That's a situation where Prince had I think it was
11 half a dozen unreleased songs --

12 THE COURT: I'm familiar with the facts of Pince.
13 It was the engineer who had these 11 recordings.

14 MR. COOPER: Correct. 11.

15 THE COURT: And one of them was disclosed, and I
16 think that's the part that the defense relies on, but that's
17 different than the ten unreleased recordings.

18 MR. COOPER: Correct. But that was widely
19 disclosed. I mean, that was put up for sale like you would
20 see in any other album where you're trying to maximize the
21 revenue from it and have the widest possible exposure. We
22 have nothing like that here.

23 THE COURT: Right.

24 MR. COOPER: I understand why the Court found
25 that. Once it's out, seriously out, it's out. This is not

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1 under any construction of the relevant facts.

2 A few other things just on this release of the
3 music. As I pointed out, the opposition brief, you know,
4 itself caveats everything it says about that. They
5 reference a Staten Island video, which I watched recently.
6 It's 57 seconds. There is no music on it. None. I mean,
7 at least from the watcher of the video. So you have no idea
8 if they're hearing something or they're not hearing
9 something, if these are actors, not actors. And they're
10 very short snippets, again. So that does not lead to any
11 sort of a conclusion as to a wider release.

12 The Billboard article that they cite, first of
13 all, I question whether it's really admissible evidence for
14 this proceeding. But assuming it is, you know, I think it's
15 all captured by the title which says the album is being
16 offered to the public, that's sort of true. It hasn't been
17 offered to the public. The parties that they reference
18 where people did listening were private, which is what is
19 one of the restrictions that's in the agreement. They were
20 ticketed. People's phones were taken away, their cell
21 phones were taken away. Everything was done in a very
22 secure way. And going back to the launch they're doing, to
23 the extent people pay and become owners in the future, they
24 get encrypted copies. They do not get copies that they can
25 assess themselves.

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1 So I'm just going to sum up. Mr. Shkreli --

2 THE COURT: Before you sum up, I have one question
3 for you.

4 MR. COOPER: Go ahead.

5 THE COURT: You also rely to some extent, it seems
6 to me, on the rebuttable presumption that would apply under
7 the DTSA.

8 MR. COOPER: Right.

9 THE COURT: But wouldn't you agree that in order
10 for me to apply that rebuttable presumption, I would
11 actually have to make a finding that the album is a trade
12 secret? And I have to tell you, I don't think that's
13 something I'm prepared to do at this stage, which doesn't
14 mean I can't find that there's not a serious question as to
15 the merits of those claims. I just think making that
16 finding would be premature. And obviously there's some
17 briefing I think in the offing on those issues, namely the
18 merits of the claims themselves.

19 So I don't think even if I were to say there's a
20 serious question as to the merits of your trade
21 secret-related claims, the DTSA, and also the
22 misappropriation claim, that that would then enable me to
23 apply the rebuttable presumption.

24 MR. COOPER: Well, as you sort of --

25 THE COURT: You obviously cite the *Faiveley* case,

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1 F-A-I-V-E-L-E-Y --

2 MR. COOPER: Yeah.

3 THE COURT: -- for the proposition that such a
4 presumption can be applied where there's a finding that the
5 item in question is a trade secret.

6 MR. COOPER: No, it would have to be a trade
7 secret, and I do not think you need to go there, honestly,
8 in order to impose the injunction. I think you have plenty
9 of other grounds for it.

10 However, the definition of trade secret is pretty
11 broad under 1839(3). It talks about digital works. It
12 talks about compilations. I don't think there's any doubt
13 that this is a formula, a compilation, a collection that is
14 not in the public domain, that gives an economic competitive
15 advantage by its secrecy. So I think you could find a
16 likelihood of success on that and potentially rely on that.

17 There also really isn't a full-throated rebuttal
18 of the fact that it's a trade secret.

19 THE COURT: Yeah, there's not much of a --

20 MR. COOPER: Not much.

21 THE COURT: But let me just say this, and the only
22 reason I'm cutting you off is because, as I said at the
23 beginning, I want the focus to be on the irreparable harm.
24 Now, obviously I guess the argument would be that if it's
25 not a trade secret, then there can't be any irreparable harm

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1 because there's no legal claim to prevent dissemination or
2 misappropriation of the trade secret because there isn't
3 one. But I don't want to go too far down this road.

4 I will say that I, and I'm previewing it, I am not
5 prepared to find that there's a likelihood of success and my
6 focus is mostly on the serious questions prong of the first
7 element, which, and this is a preview for you, Mr. Dykema, I
8 am inclined to find, I don't think it's a slam dunk, if you
9 will, that this is a trade secret and, in fact, the *Paisley*
10 *Park* case addresses that fully or squarely, and I think in a
11 very -- and I thought this myself, it's phrased in a way
12 that I think makes perfect sense, which is one could argue
13 that there's something different about a recording, the
14 value of which is derived from actually playing it or
15 disclosing it, performing it, if you will, than there is,
16 for example, the formula to Coca-Cola, where the value is
17 derived from keeping the formula secret, but disclosing, if
18 you will, or distributing the product that comes out of that
19 formula.

20 We don't the need to debate this now, and this is
21 more by way of preview for your motion to dismiss, I think
22 the *Paisley* -- I think I commend your attention to the
23 *Paisley Park* analysis, which precedes the part we were
24 discussing about the irreparable harm, because I think that
25 that really crystallizes a problem.

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1 I know it could be viewed a different way,
2 Mr. Cooper, and you're going to argue that it's the
3 recording that is the trade secret. It is the ability to
4 replicate those songs that is a trade secret that is held in
5 secret, under lock and key. I understand that your client
6 has armed guards that protect this. I have a visual in my
7 mind that strikes me as some sort of comical movie almost in
8 a way. But nonetheless, like -- who's that guy? It doesn't
9 matter.

10 Anyway, the point is, and I'm not mocking this,
11 I'm just saying I understand that the argument can go both
12 ways, but I don't think that is a foregone conclusion, but I
13 do think at this point there is a serious question as to the
14 merits of that argument and your claim therefor. But I
15 don't want to go too far down that road. That's the only
16 reason I'm cutting you off.

17 Let me hear from Mr. Dykema. And in particular,
18 Mr. Dykema, what I want you to explain to me is what we just
19 discussed, *Paisley Park*, I agree with Mr. Cooper, doesn't
20 really go your way. In fact, I think it's the most
21 straightforward application of the irreparable harm standard
22 in a situation that is remarkably similar. We're talking
23 about the release of previously-undisclosed, and I know
24 you're going to debate a little bit about the facts, but I
25 want you to answer another question on that issue, but

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1 previously-undisclosed recordings, artistic recordings. And
2 the case clearly says that the rightful possessor of those
3 or owner of those recordings is the person who should be
4 able to decide or the company who should be able to decide
5 when, how, and where those are released. And therefore,
6 there is a potential violation of the Trade Secret Act by
7 virtue of that. Or that's at least a protectable interest.

8 So I'm surprised you rely on *Paisley Park* because
9 I think it actually cuts exactly against your position about
10 the irreparable harm because that case very clearly stands
11 for the proposition that it can't really calculate or you
12 cannot adequately calculate the value of being able to
13 control the release of this unique object, these unreleased
14 songs.

15 But the second thing I'd say to you is on the
16 facts that are being discussed, which haven't been fully
17 developed, but I don't feel that there's a need to, about
18 your client's disclosure of the songs themselves or even the
19 disclosure by way of sampling by the plaintiff, even if the
20 music is played for small groups of people, that -- and this
21 goes back to what is actually the trade secret -- that
22 doesn't mean that there's been a disclosure of the trade
23 secret which under one construction is really the actual
24 recordings themselves along with the box and the whole
25 experience, if you will, of listening to it, however it's

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1 curated by plaintiff.

2 So even if I accept the fact that your client, by
3 his own admissions or statements, has disclosed it to 50
4 people here or 50 people there, the songs, that is, there's
5 no evidence that the actual recordings themselves have been
6 made accessible in any public way or that the recordings
7 have been distributed in any way. And that, to me, is
8 really the trade secret, if there is one, that's being
9 protected here or being alleged. Do you see what I'm
10 saying?

11 So, therefore, I don't think you really go -- even
12 if I accept your argument that your client has played the
13 music for some of the people, that that actually undermines
14 the irreparable harm that the plaintiffs are claiming, that
15 that's not really disclosure at all comparable to what
16 happened in *Paisley Park*, where the album was available for
17 everybody to download or to play for themselves whenever
18 they wanted to.

19 MR. DYKEMA: Thank you, Your Honor.

20 Let me first just say that I've been a big fan of
21 the Wu-Tang Clan and their music for close to 30 years and I
22 consider it a great privilege to be able to be here and
23 argue this case with everybody. So thank you.

24 THE COURT: All right.

25 MR. DYKEMA: I'd also like to say initially that

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1 both in the papers and in his remarks just now, my adversary
2 makes a lot of my client's colorful history, experiences
3 before this in other courts and so on. Again, his record
4 and his statements speak for themselves, and I'd just like
5 to point out that whatever his notoriety or public
6 statements may be, under the Constitution of the United
7 States, he has the equal protection of the laws as anybody
8 else. And on these very narrow issues, in my view, most if
9 not all of his prior conduct and his public statements are
10 simply irrelevant to the claims at issue in this TRO
11 proceeding other than his statements relating to the musical
12 work in question.

13 THE COURT: I don't know how you can pick and
14 choose in that regard. Why should I disregard some, but
15 only credit the ones that you think are some kind of
16 evidence? Because I actually think his, what I would say
17 is, contumacious behavior throughout the criminal trial is
18 relevant to what remedy or the scope of that preliminary
19 injunction, should I issue one, should be. And I'm happy to
20 talk about that later. But I'm not sure I accept your
21 proposition that you can tell me, well, take these
22 statements that he made seriously that he distributed the
23 work in some way, but don't take any of his other statements
24 seriously that he made throughout the course of his
25 proceedings in this very court that gave rise to this

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1 situation that we're facing now.

2 MR. DYKEMA: Thank you, Your Honor. I believe you
3 might have misunderstood me. I'm not suggesting that you
4 couldn't or must not take note of his other statements in
5 fashioning some sort of remedy.

6 Per our briefing and per your instruction earlier,
7 today we're just focusing on the irreparable harm standard
8 and whether that prong has been met. And on this point, on
9 the point of whether the plaintiff's going to suffer
10 irreparable harm, again, most if not all of the statements
11 and conduct alluded to in the motion, with the exception of
12 statements and so on relating to his contact with the album,
13 are not relevant. Whether they come in at some other stage,
14 including the appropriateness of the remedy or the
15 likelihood of success on the merits, I leave that with the
16 Court.

17 THE COURT: Okay.

18 MR. DYKEMA: Briefly, Your Honor, I'd like to sort
19 of categorize the issues in sort of three small buckets.

20 One issue, and Mr. Cooper spoke on this and you
21 mentioned it yourself, is what are the actual facts at issue
22 on the record before the Court now going to whether the
23 plaintiff has shown irreparable harm or not.

24 Number two is, aside from sort of actual facts,
25 what does the law including the contracts at issue, what

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1 does the law on the contracts say on these points.

2 And third, and again my adversary raised this
3 briefly now in his remarks, although it wasn't in the
4 papers, whether or not a monetary value can be assigned to
5 the work or to its remuneration or distribution.

6 On the first thing, Your Honor, I think that the
7 other side is somewhat -- not somewhat -- substantially
8 underplaying the previous exposure of the musical work and
9 the tracks at issue in this case. Just going by the papers
10 that are on the record before this court, the plaintiff
11 alleges that the defendant has already released the album
12 via the internet back in 2015 or 2016 before the forfeiture
13 order took place, then again in June of 2022 --

14 THE COURT: Again, let me ask you, when you say
15 the word release the album, let's be more precise, meaning
16 played it for people or actually made it so that other
17 people could just play it whenever they wanted to? Because
18 I think there's a meaningful distinction here when we're
19 talking about the potential for irreparable harm. If people
20 hear it once -- because he was restricted as he acknowledged
21 by the original purchase agreement to only play it in
22 non-concert venues and if he was going to make money from
23 it, then he had to share the royalties or whatever that was.
24 But there's no evidence that he violated and he's certainly
25 not saying he violated the original purchase agreement. And

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1 so at most, he might have convened some small listening
2 groups in a non-concert venue where he didn't charge any
3 money, if he's staying true to the agreement. But he didn't
4 distribute copies of it. So it's not released in the sense
5 that no one has that recording still and no one can control
6 the replaying of it.

7 MR. DYKEMA: Allow me to touch on both of those
8 points, Your Honor.

9 THE COURT: Okay.

10 MR. DYKEMA: First, as to the, to use my
11 adversary's words, you know, small groups of people that he
12 purportedly played the album to, plaintiffs themselves
13 allege that in one of these small listening groups on the
14 internet, over 4,900 people were there and heard the album.
15 And obviously in this age of digital technology, any one of
16 those people could have recorded it and frankly it seems
17 very unlikely that nobody recorded it and --

18 THE COURT: But let me say this. If that were the
19 case, you don't think we would have seen this all over the
20 internet? And moreover, only your client knows, what were
21 the conditions under which they were allowed to view it?
22 Because I don't know if it was in a setting where he
23 controlled the entire environment. We obviously all know
24 that often you view things on Zoom, but you can't record it
25 unless I guess you're sitting there with some sort of

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1 recording device up to the screen. But there is no evidence
2 before me that somehow that listening party, even assuming
3 it was 4,900 people, led to the dissemination of any of the
4 songs. And I don't know, for example, if the entire album
5 was played. I guess was it represented that it was, all
6 two-plus hours of it?

7 Whatever it is, I mean, I think the length of it
8 does matter and I think the fact that there's no evidence
9 before me that somehow someone did record it. I mean,
10 you're speculating. Because it seems to me that between
11 2015 and now, certainly there would be some evidence of
12 that, if someone recorded it and then distributed it even
13 more broadly because it has value, or because somebody, if
14 they were recording it, I don't know, maybe they were doing
15 it for their own pleasure, but it seems more likely they
16 were doing it for profit.

17 So bottom line is I'd have to speculate that some
18 of those 4,900 people, even accepting that that happened,
19 recorded it. But still, it doesn't lead to any wider
20 distribution, period.

21 MR. DYKEMA: Perhaps I should have discussed these
22 in reverse order, Your Honor.

23 So with respect to entire copies of the album
24 being distributed that people could play on their own
25 outside of the control of either party or of a YouTube

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1 stream or a Twitter stream or whatever, the plaintiff's
2 papers allege, first, that he sent copies of the CDs to at
3 least 50 different people. They also allege that he said --
4 and I believe it's true that he said this -- that over 5,000
5 people have this CD. I agree with Your Honor that there's
6 not a lot of evidence before the Court on this point other
7 than the plaintiff's papers and pleadings and allegations.
8 That's it. They wrote it, and it would be unfair, in my
9 view, to sort of allow them to back away from those
10 statements now.

11 And furthermore, if there's some question about
12 these numbers or what's been decided, in my view, to -- to
13 say it differently, you'd have to engage in some speculation
14 either way, right?

15 THE COURT: Well, no. I mean, let me say this,
16 and I apologize that I keep cutting you off. I'm going to
17 accept like an outside number of 10,000 people, for example,
18 have heard some or all of the songs on the album. Even if
19 that were true, I do not think that that diminishes the
20 notion that there would be irreparable harm from further
21 distribution, that somehow it's been disclosed in a way that
22 it doesn't retain some incalculable value based on the
23 plaintiff being able to curate how people listen to it and
24 release some or more of the songs in whatever form they
25 choose, not just playing it sometimes, but maybe even

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1 selling copies of it.

2 So there's no evidence before me that suggests
3 that the value to plaintiff at least of having this album
4 has been diminished significantly, if at all, by even
5 assuming 10,000 playings of the recording for other people.
6 And that's the outside number, right?

7 MR. DYKEMA: If I may, Your Honor, I think
8 there's -- again, I just want to distinguish between two
9 different things.

10 Again, on the record before us, it's been alleged
11 that there were approximately, let's say, 10,000 people have
12 listened to streams of the album, I believe. There were
13 multiple instances where the plaintiff alleges that Shkreli
14 played the album in his Twitter spaces or otherwise on the
15 internet --

16 THE COURT: Is this on Discord or something else?

17 MR. DYKEMA: There's Discord, there's Twitter
18 spaces.

19 THE COURT: Oh, right.

20 MR. DYKEMA: I'm not super familiar with all of
21 these different websites.

22 But then separately, there's the allegation in the
23 plaintiff's pleadings and their papers on this TR0 motion
24 that at least 5,050 people have copies of the CDs. I agree
25 with Your Honor from the standpoint of potential damages for

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1 copyright infringement, which plaintiff hasn't pled here,
2 that distribution may have in the past caused them harm and
3 they could make claims for copyright infringement and
4 damages and so on.

5 But the analysis under a trade secret or
6 irreparable harm standard is, respectfully, we believe it's
7 different, Your Honor. Courts in this district, the Second
8 Circuit and the Supreme Court, in fact, have held that once
9 a secret or a purported secret is disclosed to others who
10 are under no obligation to maintain its confidentiality, the
11 property right in that secret is extinguished. And I'd like
12 to touch on that in a moment when I get to the contract
13 language.

14 But here again, just maintaining this discussion
15 for this moment to the facts, on the fact that plaintiff has
16 put before this court, over 5,000 people have a copy of this
17 record.

18 THE COURT: Where in the plaintiff's submission
19 are you referring to? Because I'm looking at page 7 which
20 talks about him bragging about -- oh, I see it here. This
21 thread is about someone listening to a CD, and then there
22 seems to be a greater than sign, 5,000 people have.

23 MR. COOPER: Where are you, Your Honor?

24 THE COURT: I'm on page 7 of your memo. I don't
25 know who asked that. Mr. Cooper?

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1 MR. COOPER: Yes, Your Honor.

2 THE COURT: In your original memo. That's what
3 they say. But that's different. That doesn't mean they
4 have a copy of a CD. It just says they were listening to a
5 CD, over 5,000 people. Is that what you're referring to?
6 This is where he's talking, the plaintiff, by saying -- I'm
7 looking at page 7 of the motion paper, which is docket
8 number 4. This is the plaintiff's memorandum of law.

9 MR. DYKEMA: Yes, Your Honor.

10 THE COURT: Now maybe it's excerpting something
11 from the complaint and I haven't gone back to look at the
12 complaint, but the allegation seems to me that Shkreli said
13 this thread is about someone listening to a CD, over 5,000
14 people have. It doesn't say have the CD. It says have
15 listened to it.

16 Am I misinterpreting what Mr. Shkreli said?

17 MR. DYKEMA: I understood, Your Honor, that quote
18 to mean that 5,000 people have the CD.

19 THE COURT: Well, to me it doesn't say that. It
20 pretty clearly says it's about people listening, or about
21 someone listening to a CD, over 5,000 people have, have
22 listened to it. Again, if 5,000 people have a CD with all
23 the Wu-Tang Clan songs on it, I don't think we'd be sitting
24 here having this conversation because surely people would
25 have been posting it online. I mean, it defies common sense

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1 that I have not -- or that there's no evidence out there
2 that anyone has an actual physical recording of what's on
3 that album. Surely it would have been released. If 5,000
4 people had a CD with it, given the notoriety of this
5 singular album, you mean to tell me that nobody would have
6 said, hey, I've got a copy of the album, I'm going to play
7 it for you?

8 MR. DYKEMA: Respectfully, Your Honor, allow me to
9 push back for two reasons --

10 THE COURT: Let me go back for one second.

11 MR. DYKEMA: Yes, Your Honor.

12 THE COURT: Let's just bear in mind that we're
13 relying on Mr. Shkreli's own statements, right? Obviously
14 he's the one who knows what he meant when he said that. You
15 could ask him: Did you mean that 5,000 people have a CD of
16 it or do you mean that 5,000 people listened to the CD?

17 MR. DYKEMA: I will ask him, Your Honor. I don't
18 have that information right now.

19 Separately from the 5,000, though, there is an
20 allegation in the papers that at least 50 people have a CD,
21 that he sent copies to 50 different individuals.

22 THE COURT: Where is that now?

23 MR. DYKEMA: That is --

24 THE COURT: Oh, at the bottom he says in
25 responding to a comment on this post, again still referring

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1 to page 7, Mr. Shkreli wrote: I've already sent it to 50
2 people. And this would refer back, I guess, to some copies
3 he downloaded.

4 MR. DYKEMA: That's right, Your Honor. Where he
5 says burned the album. In the language of computers that
6 means that he took the MP3 recordings of the music and
7 burned it on to physical CDs. That's what burning refers
8 to, I believe.

9 And so again here, on the plaintiff's papers, 50
10 different people have copies of the album and are under no
11 obligation to maintain its secrecy.

12 But regardless of the exact number, I'd just like
13 to push back on two things.

14 First, Your Honor, it doesn't surprise me that
15 people aren't distributing this album all over the place
16 because to do so would be an infringement of the copyrights
17 on the album.

18 THE COURT: Well, I want to ask you about that,
19 because the original agreement reserved 50 percent of the
20 copyrights to the Wu-Tang Clan members who sold the album
21 and 50 percent to Mr. Shkreli, which obviously he forfeited
22 at the time that his interest in the album was forfeited to
23 the Government. So he doesn't have any copyrights, correct?

24 MR. DYKEMA: No, Your Honor.

25 THE COURT: We say that, but how could he

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1 possibly?

2 MR. DYKEMA: I wasn't going to go here because
3 we're talking about the -- but I'm happy to discuss it, Your
4 Honor.

5 The forfeiture order lists several different items
6 of property that Mr. Shkreli is to forfeit according to the
7 criminal forfeiture --

8 THE COURT: Not items of property; interest in
9 property. There's a big difference. And that's why what
10 you wrote I don't think is a fair characterization of the
11 forfeiture order, and I can pretty much guaranty you that
12 based on having talked to Judge Matsumoto as well. It
13 didn't say right, title, and interest, but it said interest
14 in the following property. To me, interest definitely
15 covers the contents of that album. This is why I
16 fundamentally disagree with you that he didn't violate the
17 forfeiture order by keeping copies of the recordings, the
18 contents of the album. I don't know under what construction
19 he could have thought that forfeiting the album, his
20 interest in the album, didn't include forfeiting the
21 contents, given that the interest depends on the uniqueness
22 or the singular possession of the contents of that album.

23 MR. DYKEMA: I respectfully disagree, Your Honor.
24 Whether we want to describe it as property or interests that
25 are listed in the forfeiture order, several of the items in

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1 the forfeiture order have no copyright or other intellectual
2 property interest attached to them. The Picasso painting,
3 for example, has nothing to do with copyrights. The E*Trade
4 account has nothing to do with copyrights. Another album
5 that Mr. Shkreli has no copyrights in, that forfeiture item
6 has nothing to do with copyrights.

7 THE COURT: That may well be, but the phrase is:
8 Defendant shall forfeit his interest in the following
9 assets. So "interest" is obviously specific to the item.
10 Here you have an item that is an album, a physical thing,
11 just like a painting or something like that, but it also has
12 electronic data in it, or however you want to call it;
13 digital or analog data in it. That's part of the object and
14 that's part of his interest in the object, and the
15 copyrights are also part of his interest in the album. I
16 don't know how you could disagree with that.

17 MR. DYKEMA: I apologize --

18 THE COURT: You do disagree.

19 MR. DYKEMA: I do respectfully disagree, Your
20 Honor. I'd be happy to provide supplemental briefing on
21 this. But generally speaking, in intellectual property law,
22 the intellectual property associated with an object is a
23 res, it's a property interest separate and apart from any
24 interest in the object itself. We do not disagree that
25 Mr. Shkreli forfeited the engraved box and the copies of the

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1 CDs and the book and so on. Those items were forfeited to
2 the Marshal Service by the forfeiture order. There's no
3 question about that.

4 The question is, does the forfeiture order
5 additionally order Mr. Shkreli or forfeit Mr. Shkreli's sort
6 of other intangible rights, specifically the copyright.
7 Which the copyright statute itself -- and I don't have it
8 before me, but I can look it up -- generally says if you're
9 going to transfer copyrights of an object, it has to be
10 specifically listed in the written document.

11 THE COURT: But we're talking about a forfeiture
12 order, obviously, and the interpretation of that. You may
13 be speaking about copyright law, which I think is separate
14 from that. And obviously this was not an issue raised by
15 defense counsel or the Government at the time I think with
16 Judge Matsumoto.

17 But when you say, well, he did forfeit all the
18 other trappings in the album, they're not specified here
19 either, but yet you say that was covered by the reference to
20 the album. To me, the contents of the album certainly have
21 to go with it too, and the contents of those albums includes
22 the right to control those contents. It says "the
23 interest." It doesn't say the following items. It says the
24 interest in it. The interest is the ability to control that
25 item; what's in it, what comes with it, everything. So you

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1 and I could disagree, but ultimately I'm not going to adopt
2 your interpretation.

3 I'll obviously let you brief this issue more, but
4 again, the reason I don't want to get too much into it is
5 because I think there's at least a question, a serious
6 question raised about whether he violated the forfeiture
7 order. Although I'll say this, and again by way of spoiler
8 alert, I'm not sure that I agree with plaintiff's argument
9 that they are the third-party beneficiary of the forfeiture
10 order or have the right or ability to enforce the order.

11 Quite honestly, I think the forfeiture order
12 should be enforced by the Government by way of his violation
13 of his supervised release because he's required to comply
14 with the forfeiture order, or some belated finding of
15 contempt with respect to the forfeiture order because he
16 didn't turn over the recordings of the album itself. That
17 is beside the point, because I don't necessarily need to
18 find that there's a serious question as to all of the
19 claims. I just need to find that there's a serious question
20 as to one or more I think in order to issue the preliminary
21 injunction.

22 But again, we're getting a little farther down the
23 road, and I'm sorry I dragged you there with me. I
24 appreciate what you're saying. This is all to me a preview
25 to your motion that you're going to file about a motion to

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1 dismiss.

2 But go back to your argument. Let's talk about
3 this distribution issue. As you can tell, I'm not convinced
4 that there is evidence that there has been actual
5 distribution of the alleged trade secret. I admit that this
6 is an unusual trade secret claim, right, because you could
7 parse it different ways. Is it the album itself? Is it the
8 recording within the album? Because, as the *Paisley Park*
9 case says, the songs themselves, the value that's derived
10 from this alleged trade secret is the playing of the songs,
11 the disclosure of the songs, if you will. But the other way
12 to look at it is, it's the digital recording, the analog
13 recording; if you want to liken it to a program, a formula,
14 et cetera, that may be the trade secret. That's the
15 Coca-Cola formula, and then the song is the Coca-Cola that
16 you distribute, if you will.

17 So that's how I view this issue and I think it's a
18 tricky one at best, but I do think there's a serious
19 question about the merits. I'm not prepared to find a
20 likelihood of success, but I do think there's a serious
21 question about it.

22 Then your argument is that, okay, fine, even if
23 you accept it's a trade secret, that there's a serious
24 question about the merits of their claim, there's no
25 irreparable harm because there's been a distribution of the

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1 songs to some extent. At least maybe 10,000 people have
2 listened to the stream; that's how I interpret the comment.
3 Or you would say 5,000 CDs, therefore the formula, if we're
4 going to accept that formulation of the trade secret, right?
5 The actual formula being distributed.

6 MR. DYKEMA: If I may, Your Honor, I would phrase
7 it a little bit differently. In our view, it's black letter
8 law. I know that we're talking about music distribution, so
9 we're thinking about large numbers and we're thinking about
10 value and dollar amounts from plaintiff selling their NFT
11 thing, which I'll get to in a moment.

12 But trade secret law and the Supreme Court
13 precedent on this issue is not sort of adaptable to the
14 different circumstances of distribution or whatever. Under
15 trade secret law, it only takes one. It only takes one
16 disclosure to one person who's not commanded to sort of
17 maintaining the confidentiality of that material for the
18 trade secret rights to be extinguished. It's not --
19 plaintiff goes to great lengths in their papers to discuss
20 they have armed guards and so on and so forth. Fair enough.
21 But the disclosure that made the -- took away, extinguished
22 the trade secret rights happened before plaintiff ever
23 acquired the work.

24 THE COURT: Let me say this: Then we have an
25 evidentiary issue, because I'll tell you this: I'm not

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1 going to accept Mr. Shkreli's claim after this lawsuit was
2 filed, I think, if it was in May of 2024, saying that I've
3 destroyed the value already, therefore they can't make any
4 claim of irreparable harm against me. I am not accepting
5 that, because this is not a person who has a record of
6 credibility or fidelity to the law, let's put it that way.
7 So that I would not accept.

8 If you want to have a hearing where you bring
9 Mr. Shkreli in and he provides the actual details of who he
10 distributed it to, which is what the plaintiff wants
11 anyway -- an accounting, if you will -- then maybe we could
12 have a different discussion.

13 But even if I accept that there are 5,000 copies
14 of a CD distributed, I think the reason I'm so skeptical of
15 it is exactly what I've said before. You can argue just
16 one, and I'd like to see the case law on that, where there's
17 no restriction on it. I guess I am really more focused on
18 it is an evidentiary issue. I don't accept that
19 representation in large part because there has been no
20 further distribution of it. No posting of it. No
21 dissemination. No attempt to profit from it. It defies
22 logic and common sense that anyone has an actual copy, an
23 analog, CD copy, whatever you want to call it, of the
24 contents of the album.

25 MR. DYKEMA: Thank you, Your Honor.

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1 Two quick points, and with your indulgence I'll
2 return to my argument.

3 THE COURT: Please.

4 MR. DYKEMA: First, if this Court thinks we need
5 to have an evidentiary hearing to resolve some of these
6 issues, we're completely open to it and we'd love to do it.
7 We didn't bring more evidence per your instructions.

8 But on that point, again, I don't think you have
9 to go there because plaintiff's own words in their papers
10 here cite allegations that Mr. Shkreli made these
11 disclosures before the lawsuit started, before they
12 purchased the work --

13 THE COURT: But I have to believe the allegation,
14 right? I don't believe it.

15 Oh, wait, the allegation about the 5,000 CDs being
16 distributed?

17 MR. DYKEMA: Yes, Your Honor.

18 THE COURT: Okay.

19 MR. DYKEMA: So there are allegations I believe in
20 the Complaint that he was distributing it or playing it
21 online at least before the forfeiture order took effect and
22 that he made copies back then.

23 THE COURT: Well, remember, playing it online and
24 distributing it are very different to me. Playing it online
25 means someone gets to listen to it. That, to me, doesn't

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1 diminish the value of it such that they cannot claim
2 irreparable harm. Actually handing out CDs of it, which is
3 really getting to what I think at core is the alleged trade
4 secret, the digits, the analog recording of it, that's a
5 different story.

6 And let me look back to see when exactly he made
7 this statement.

8 It said on May 13, 2024, Shkreli appeared as a
9 guest on a podcast and stated that he burned the album and
10 sent it to like the 50 different chicks, and then he said
11 something really crass and disgusting. And then on May 14,
12 2024, he said something about already sending it to 50
13 people.

14 Now, I don't know if in those post-litigation,
15 post filing of this lawsuit comments he also said but I did
16 it back in 2015, you know, before I was forced to turn over
17 the album. And quite honestly, again, I'm skeptical of his
18 claim even if he claimed to have done it then, because it
19 seems like before he got prosecuted or before he was forced
20 to turn it over, it seems to me somebody would have posted
21 those songs.

22 So again, I'm inherently skeptical of any claim he
23 made, especially because he was limited by the purchase
24 agreement. I don't think he was allowed to, by the original
25 purchase agreement, to make copies of it and disseminate it.

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1 Isn't that correct?

2 MR. DYKEMA: It is not correct, Your Honor. But
3 let me touch on that in one moment.

4 THE COURT: Go ahead.

5 MR. DYKEMA: So first, again, if the Court would
6 like to have an evidentiary hearing, at that hearing I
7 believe we would be able to present evidence that, in fact,
8 copies of the album are available on the internet. That, in
9 fact, it is circulating on BitTorrent and other networks --

10 THE COURT: Well, why didn't you produce that now
11 even by way of declaration? That certainly would have gone
12 a much further distance in making your argument that there's
13 no irreparable harm possible.

14 MR. DYKEMA: I thought that the plaintiff's own
15 statements in their papers on this point were sufficient.
16 But --

17 THE COURT: Let's do this. I do think that this
18 is potentially relevant, although I also want to see your
19 case law that says that even one distribution of this would
20 be enough, and then I certainly want to see some evidence
21 that it actually has been distributed in its analog format.
22 And I'm going to call it that even though that may be the
23 wrong terminology.

24 MR. DYKEMA: Could I speak on two more quick
25 points, Your Honor?

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1 THE COURT: Yes.

2 MR. DYKEMA: So first I'd like to take a look at
3 the contract. I'm talking now about the original contract
4 between the sellers of the album, Wu-Tang, and Mr. Shkreli
5 when he purchased it. It's document 4-3 in the record. It
6 was attached to plaintiff's motion for a TR0.

7 THE COURT: Hold on one second.

8 MR. DYKEMA: Yes, Your Honor.

9 THE COURT: Yes, okay. Go ahead.

10 MR. DYKEMA: First, Your Honor, I'd just like to
11 point out on page 5, paragraph 4(b)(1), this paragraph
12 states, and I'm going to read from the document, Your Honor:
13 The work includes the following rights which are assigned to
14 the buyer. 50 percent of the copyrights and renewal
15 copyrights in the recordings and musical compositions
16 embodied in the work. Then the buyer agrees to some
17 restrictions, including that buyer may duplicate or
18 replicate the work for prior use, but shall not duplicate,
19 replicate, or exploit the work for any commercial or
20 noncommercial purpose by any means. But the owner is then
21 allowed permitted uses which are limited to the public or
22 private exhibition or playing of the work, with or without,
23 charge in a variety of locations.

24 THE COURT: Which are not concert venues.

25 MR. DYKEMA: Yes, Your Honor, which are not

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1 concert venues.

2 So two things, Your Honor.

3 First, the contract right there on page 5 says
4 that the buyer may duplicate or replicate the work for
5 private use.

6 THE COURT: What does "private use" mean, though?
7 His own use?

8 MR. DYKEMA: I would say it certainly includes his
9 own use, and he did duplicate the work for his own use. And
10 I would say duplicating or replicating the work for your own
11 use also includes giving a copy to one of your friends. As
12 a copyright owner, Your Honor, I believe he's entitled to do
13 that.

14 THE COURT: Right. But again, we're debating the
15 facts of when he actually did that. If doesn't go to the
16 irreparable harm issue. Like I said, I'm still skeptical of
17 the notion that he gave it to anybody. I actually raise it
18 as an aside, but it's really not relevant, that he was not
19 permitted to do so as another reason that I question he did
20 so.

21 I'm not necessarily convinced about your
22 interpretation because "private use" suggests his use, not
23 private versus public, I guess; meaning commercial versus
24 noncommercial. Private, to me, suggests his own use. But
25 shall not duplicate, replicate, or exploit it for any

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1 commercial or noncommercial purposes by any means today
2 known or that come to be known.

3 So I don't know how you don't think that that
4 second part makes clear that he could only replicate it for
5 his own purpose or record it for his own purpose, but not to
6 exploit it for any commercial or noncommercial purpose,
7 which I think includes giving it to his friends for some
8 benefit; perhaps this disgusting thing he references in his
9 text.

10 MR. DYKEMA: If I may, Your Honor, as opposed to
11 the first part of the argument talking about the facts and
12 whether the work was actually disclosed to 5,000 or 10,000
13 or 50 people as the plaintiff wrote in their papers, I
14 believe that here, the issue here is not with respect to the
15 contract and the law on trade secrets. The issue is not
16 whether it actually happened. The issue is whether the work
17 was disclosed to an individual who was not under an
18 obligation to maintain its confidentiality. And under this
19 original contract, that individual was Mr. Shkreli. Wu-Tang
20 Clan disclosed the work to him and he was under no
21 obligation to maintain its confidentiality because he was
22 explicitly allowed to make copies and publicly exhibit it
23 with or without charge in locations such as his home,
24 museums, art galleries, restaurants, bars, exhibition
25 spaces, and so on.

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1 THE COURT: But I think we're confusing two
2 things. One is, again, irreparable harm. You're trying to
3 prove to me that there has been at least one dissemination
4 of the actual recording itself, and, in fact, you would say
5 there's 50 copies of the CD out there.

6 The second issue much whether he had the right to
7 do it or not doesn't weigh on that except I was skeptical of
8 the notion that he actually did it because I thought the
9 agreement prohibited him from doing that. But let's put
10 that aside because that requires us to interpret the
11 contract, and moreover, it requires us to interpret what he
12 believes the contract means. And also it obviously doesn't
13 affect what happened after the forfeiture, but that's not
14 relevant either.

15 Again, the only question is an evidentiary one:
16 Did he actually, as he claims to have back in 2015 or before
17 the criminal case or the forfeiture order, distribute copies
18 of the actual recording itself, the album's contents, to any
19 individuals via CD or otherwise. You say I should believe
20 that. I'm extremely skeptical of it because they've never
21 come up in the internet sphere. You also suggest that they
22 are out there, but you didn't provide it because you thought
23 this was enough.

24 Listen, you can proceed however you want to, but
25 you're not going to convince me based on his claims that

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1 he's resurrecting now supposedly that did it back in 2015,
2 because obviously he has an incentive to muddy the waters
3 and try to argue, as you're doing, that there is no
4 irreparable harm because I've already disclosed it,
5 potentially contrary to the purchase agreement.

6 But we'll put that aside.

7 Let me also ask you, does your argument carry any
8 water with respect to his unjust enrichment claim? In other
9 words, isn't there a different argument about irreparable
10 harm if the claim is, listen, he's unjustly benefitting from
11 dissemination of the CDs that he was supposed to have --
12 sorry, not CDs -- the album that he was supposed to have
13 forfeited all interest in?

14 MR. DYKEMA: Thank you, Your Honor. Let me touch
15 on that and then return to something you just mentioned --

16 THE COURT: The reason I ask you that is because
17 you're focused on trade secret law, right? So let's open
18 that up to common law.

19 Can an argument still be made that there is
20 irreparable harm if the claim is unjust enrichment? He's
21 now going to completely eliminate the value. If there's no
22 injunction, he's going to go now tomorrow and blast whatever
23 he has, whatever recordings he has all over the internet and
24 completely gut the value of the album -- not completely, but
25 largely gut the value of the album that the plaintiff

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1 purchased.

2 MR. DYKEMA: Thank you, Your Honor.

3 So a couple of points. I understand that Your
4 Honor is skeptical of the truth of Mr. Shkreli's statements.
5 Fair enough. It's an evidentiary issue that we can get into
6 later.

7 I would only point out that, again, these aren't
8 statements that Mr. Shkreli made in a declaration or for the
9 benefit of the Court to believe here. These are statements
10 that the plaintiff is relying on to establish their case.
11 This is how the plaintiff is trying to establish that
12 Mr. Shkreli is a wrongdoer who has done this before and is
13 going to do it again. And fair enough, if the Court isn't
14 inclined to believe that, then I feel that the plaintiff's
15 case here falls apart because there's not evidence that he
16 has done it, like if we're going to toss all those
17 statements out.

18 That said, I want to go back to two things and
19 just clarify a very small point. Your Honor said that
20 there's --

21 THE COURT: Can I say one thing? I don't think I
22 need to find that he will do it in order to decide an
23 injunction. You're saying, you're right, maybe you can't,
24 as I accused you of before, selectively accept his
25 statements for one purpose, but not for the other, to accept

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1 that he's going to defy the law or try to get back at the
2 plaintiff by releasing it and not accept the fact that he
3 has already released it, he claims.

4 So putting that aside, do I actually have to find
5 that he's likely to release it in order to impose an
6 injunction?

7 MR. DYKEMA: Yes, Your Honor, you do. If he's not
8 likely to release it, then there's no likelihood of
9 irreparable harm. The irreparable harm here flows from the
10 fact that plaintiff alleges he's about to release this and
11 the album is going to become public and --

12 THE COURT: Well, they will suffer irreparable
13 harm if I don't impose an injunction is really what the
14 standard --

15 MR. DYKEMA: Because he's likely to release it.

16 THE COURT: Right.

17 MR. DYKEMA: I don't want to put arguments in his
18 mouth.

19 THE COURT: No, you're right. Go ahead.

20 MR. DYKEMA: One other thing, Your Honor.

21 A moment ago we were talking about, again, this
22 factual question of has he already released it, and then
23 separately, has there been a -- you know, it's an
24 evidentiary question we're not willing to talk about now --
25 whether or not there has been a release. I just want to

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1 clarify that my argument on this point there is no question
2 on the factual record before us, and I think plaintiff would
3 agree, that the work was transferred to Mr. Shkreli. He had
4 possession of the work when he purchased it from Wu-Tang
5 Clan.

6 THE COURT: Right.

7 MR. DYKEMA: My argument is not that he had it and
8 then the Court has to believe that he then recopied it and
9 disseminated it. The fact that he himself was not under an
10 obligation to maintain its confidentiality destroys the
11 trade secret interest in the property. And that's pursuant
12 to the Structured Capital Solutions case in 2016.

13 THE COURT: I mean, unfortunately now that feels
14 like really kind of a serious -- a merits question, right?
15 Can they make a claim under trade secrets given the facts of
16 this case as they allege, right, that he had the rights back
17 in 2015 or whenever he owned the album. And your argument,
18 though, is that that somehow shows that there's not going to
19 be irreparable harm if he now chooses to release it. There
20 still will be harm even though he may have a right to do it.

21 So I view those as two separate issues, and that's
22 why I was focused on the fact that you seem to be focused on
23 the irreparable harm. There will be irreparable harm, I
24 think, of the nature we discussed if he decides to massively
25 release the contents of the album. That's different from

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1 whether he has a right to.

2 MR. DYKEMA: Well, I agree, Your Honor. But there
3 will be harm if he -- or there might allegedly be harm if he
4 does release the album and competes with plaintiff in the
5 marketplace. But I would put it to the Court that this is a
6 very fine legal distinction and the question of whether the
7 harm is, irreparable or compensable with damages turns on
8 this very precise point. Because the album was -- the data,
9 the album, whatever it is, it's sort of a bedrock principle
10 of property law that you can't buy something more than the
11 other person has to sell you.

12 When Mr. Shkreli received the album, he was under
13 no obligation to maintain its confidentiality, thus the
14 album's value or any trade secret rights that might have
15 been in the album were extinguished. Whether or not he
16 actually released it is beside the point. He had it. He
17 had no obligation to maintain its confidentiality, he could
18 play it all day long in front of his house or at a museum or
19 make his own copies of it. He frequently did so. I know
20 we're not necessarily believing what he says, but the
21 plaintiff suggests that he claimed that he played it on
22 internet streams and so everyone was able to listen to it
23 and the trade secret value has been destroyed. Again --

24 THE COURT: How about unjust enrichment, then? In
25 other words, you're saying that the trade secret value.

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1 MR. DYKEMA: There is no trade secret because the
2 trade secret was extinguished, is my argument.

3 THE COURT: Okay, I get that. So even at the time
4 the plaintiff purchased it, it had no trade secret value?

5 MR. DYKEMA: Effectively, Your Honor, our argument
6 here is that when --

7 THE COURT: Hang on. The other than what they
8 paid for the album. You would agree with that.

9 MR. DYKEMA: That's damages. If they want to make
10 an argument for damages, that's fine, but that's different
11 from irreparable harm that requires a mandatory -- that
12 requires an injunction.

13 THE COURT: Well, actually, I'm trying to
14 understand your argument. Irreparable harm is something
15 that either you can calculate or can't be compensated by
16 damages or the damages would be inadequate. You're saying
17 here the appropriate measure or the measure of any damages
18 they should get, assuming they could prove one of their
19 claims, the trade secret claim, is that they only get
20 whatever they paid for the album because they've lost the
21 value of that because he already -- you would argue he gets
22 nothing because he had already destroyed the trade secret
23 value of the album by the time they got it at the forfeiture
24 sale.

25 MR. DYKEMA: Let me say, I'm really enjoying this

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1 discussion because we're getting right into the heart of the
2 matter, Your Honor.

3 THE COURT: Right.

4 MR. DYKEMA: So I'm not -- I'm definitely not
5 trying to make the plaintiff's damages case for them or make
6 any admissions like that. I would just say on this very
7 specific question of whether there has been irreparable harm
8 as opposed to other harm that could be compensable by
9 damages, again, if I was to go down to the bookstore on or
10 Boerum Street and photocopy a Harry Potter book and start
11 selling copies of it on the street, that might be harm, I
12 might be liable in copyright or for other theories, but it's
13 not irreparable harm, right? The book's already out there.
14 It's just a straight damages case.

15 Here, because Mr. Shkreli received the work and
16 was under no obligation to maintain its confidentiality, we
17 simply argue there is no trade secret. And again, when the
18 Marshal Service sold the work -- I'm sorry, not the work,
19 the album, the physical -- whatever they sold to them; we
20 maintain it was just the physical objects. But when that
21 was sold to the plaintiffs, the Marshal Service explicitly
22 disclaimed that it was unique, that anything else came with
23 it, and the plaintiff signed that contract. They were under
24 no illusions that the album hadn't been duplicated or
25 disseminated or anything else. What they're effectively

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1 trying to do, Your Honor, is put the rabbit back in the bag,
2 Your Honor; or the cat, if we're mixing metaphors here. Now
3 that it is not a trade secret, there's nothing that can be
4 done to make it a trade secret again. That ship has simply
5 sailed.

6 With respect to the unjust enrichment claims, Your
7 Honor, again, we were going to deal with it on the motion to
8 dismiss, but just to preview, all of those other state law
9 claims are preempted by the Copyright Act because they're
10 all effectively copyright claims cloaked in other state law
11 language.

12 THE COURT: Well, I mean, that's not an issue I
13 can decide right now.

14 MR. DYKEMA: Yes, Your Honor.

15 THE COURT: But it seems to me it changes the
16 argument somewhat about irreparable harm because your
17 argument hinges on the notion that he had the right back in
18 2015 to copy the work and distribute it, although I'm not
19 sure I agree with your interpretation of the purchase
20 agreement, the original one.

21 But if we're talking about unjust enrichment, that
22 sort of brings us forward into the here and now, which is
23 that his dissemination to benefit himself in some way would
24 be unjust enrichment vis-a-vis the plaintiff and they would
25 be harmed by it. It doesn't depend on it being a trade

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1 secret at all, but it has to be unjust in some way.

2 Hang on one second.

3 (Pause in proceedings.)

4 THE COURT: That may make it different because the
5 element is that the defendant benefits at the plaintiff's
6 expense and that equity and good conscience would require
7 restitution, right? And then the question still is at this
8 moment in time based on what I know or at least what
9 evidence is before me about the non-dissemination or the
10 non-accessibility of the contents of that album, it does
11 seem to me it's an irreparable harm to them, and it doesn't
12 depend on a trade secret that he had a right to exploit
13 then.

14 What we're talking about is now. He would be
15 benefitting at their expense, and there's a serious question
16 as to whether equity and good conscience requires
17 restitution. I think it makes it kind of different. You're
18 arguing preemption. As I said a moment ago, you didn't make
19 that argument before on the question of serious merits or
20 likelihood of success. That's where it should have come in.
21 I don't know if you're correct or not and you didn't make
22 that argument until just now, unless I missed it.

23 MR. DYKEMA: I believe we did, Your Honor, in our
24 papers -- I'm sorry, in our opposition to the motion for a
25 TRO.

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1 THE COURT: Point that out to me.

2 MR. DYKEMA: Give me one moment, please.

3 THE COURT: On page 11 you argue it's not a trade
4 secret.

5 (Pause in proceedings.)

6 MR. DYKEMA: It's not elaborated on very much,
7 Your Honor, but on the first paragraph of page 12, I'm going
8 to quote from our argument: Because defendant legally
9 possessed and shared the work before the forfeiture order
10 and asset purchase agreement, the work is no longer a trade
11 secret, quoting *Sorias v. National Cellular*. Once a trade
12 secret becomes public, it is no longer a trade secret.

13 THE COURT: Right. But that's your trade secret
14 argument. I'm talking about, what's your argument that
15 there isn't irreparable harm based on the unjust enrichment
16 claim, which is the here and now?

17 MR. DYKEMA: Oh.

18 THE COURT: Not back when he said, in theory --
19 and quite honestly, I still don't agree with you about your
20 interpretation of the original purchase agreement because I
21 think he did have some requirement not to diminish the value
22 of the object by maintaining its confidentiality -- I read
23 "private" as different than you do.

24 But putting that aside, your argument is more
25 based on trade secret. It could never have been a trade

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1 secret or it can't be a trade secret now because back then
2 he already disclosed it; it wasn't kept secret, right, it
3 when he possessed the right to control it. But unjust
4 enrichment simply says if at this moment in time he decides
5 to disclose it, he will benefit at plaintiff's expense, and
6 then equity and good conscience requires some compensation
7 for that.

8 MR. DYKEMA: I understand, Your Honor. You're
9 correct, we did not brief the distinction between the trade
10 secret argument and the unjust enrichment argument in our
11 papers. That said, I don't want to sandbag my opponent, but
12 to preview our motion to dismiss, the unjust enrichment
13 argument cannot stand as a matter of copyright law separate
14 from a copyright claim.

15 THE COURT: Okay.

16 Let me ask the plaintiff that question, though,
17 too, because what happened to the 50 percent copyrights that
18 existed under the original purchase agreement when the
19 forfeiture happened and when your client then bought it from
20 I guess, the Marshal Service or a third party?

21 MR. COOPER: It was supposed to be forfeited.
22 Everything was supposed to be forfeited. He has no
23 remaining interest in --

24 THE COURT: But did your client buy it? I guess
25 there could be some daylight there, although I don't know --

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1 you know, because there's an album and then there are these
2 copyrights which, I guess in theory, could exist separate
3 from the album, right? They were sold to Mr. Shkreli in the
4 beginning, but one could make the argument that the interest
5 in the album might or might not convey this 50 percent
6 copyright interest.

7 MR. COOPER: My understanding is they got all the
8 interests in connection with the album.

9 MR. DYKEMA: I have only two more small points,
10 Your Honor.

11 THE COURT: Yes, please.

12 MR. DYKEMA: On that point, I'd just refer the
13 Court to, again, the original purchase agreement, document
14 4-3 on page 5, where, indeed, what Mr. Shkreli purchased
15 from the original producers is described in two sections.
16 1 through 5 is a set of objects, and then part B is the
17 50 percent copyrights and his related rights to disseminate
18 the work and so on. Indeed, it is, as I've discussed
19 before, in our view, it's crystal clear that generally
20 speaking, rights to physical property and rights to
21 intellectual property are treated separately.

22 And I know we'll be briefing this later and I know
23 the Court might not be inclined to believe this now, but in
24 our view, the forfeiture order did not transfer the
25 copyrights because it did not specifically list them as

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1 required by the Federal Rules of Criminal Procedure that the
2 copyrights were included, especially when this physical
3 work, which on its own it's really valuable; it has precious
4 metals, in a great box, it's a one-of-a-kind object.

5 There's no question that the box, the work, the sole copy is
6 extremely valuable. There's just no indication, in my view,
7 that Mr. Shkreli's copyrights and his right to receive
8 copyrights in the future were disturbed by the forfeiture
9 order.

10 THE COURT: But aren't you just reading out the
11 word "interest in the asset" from the forfeiture agreement
12 with this interpretation of yours? You're superimposing
13 some copyright notion on top of the forfeiture order when
14 the forfeiture order mainly says he is forfeiting, he's
15 required to forfeit and being disgorged of his interest in
16 this album. How could that not include the copyright
17 interest? Because otherwise the property doesn't have the
18 purported value, right, because owning the rights to play
19 the music is the value of it; is a good part of the value of
20 it.

21 MR. DYKEMA: I understand the nuance Your Honor is
22 pointing to here, and there's two ways to view it. As Your
23 Honor set forth, one way is that we're excluding copyrights
24 from interest in. And the other is by listing a physical
25 object, the prosecutor or the Court -- the forfeiture order

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1 reads in other intangible intellectual property rights that
2 aren't specified in the order, and it would make this
3 particular item in the forfeiture order unusual and very
4 different from the other items. The Picasso painting that's
5 in the forfeiture order, there are no copyrights attached to
6 that. There were no copyrights attached to the E*Trade
7 account. There's no copyrights attached to the Lil Wayne
8 album. And so on. It doesn't specifically state that these
9 other rights were to be included.

10 Additionally, as my adversary admitted earlier or
11 suggested earlier, other things that were listed in here,
12 other items of physical property, including the speakers,
13 they weren't forfeited or collected by the Marshal Service.
14 There's no notice of that. It's difficult for me to read
15 the forfeiture order and know, okay, well, when the
16 forfeiture order lists this musical work or this physical
17 box, this album, does it include the speakers or not? Hard
18 to say. Does it include the copyrights or not? I don't
19 know. Again, we'll be briefing this later, but I believe
20 the rule of leniency here sort of implies that the Court
21 should read the forfeiture order narrowly and specifically
22 to include his ownership interest, his property interest in
23 the physical album.

24 THE COURT: I disagree with you. I mean, as a
25 judge who issues these forfeiture orders, I would not, and I

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1 don't think Judge Matsumoto did either, intend that it
2 wouldn't include a very important aspect of the control of
3 the item. How could you give away an album and let the
4 malfeisor keep the copyrights to it? I mean, you're right,
5 the only reason it doesn't apply to the other things is
6 because it's inapplicable.

7 And I don't know about the album, the Lil Wayne
8 album because I don't know if there was copyrights attached
9 to it. He might just own a nice album. But that's
10 disclosed already, that album. That's not this. This is a
11 very unique thing. It is like those electronic EFTs or
12 whatever that are produced, only one person possesses it.
13 And only one person possesses this, and it's consistent with
14 copyright and it allowed them to disclose it or monetize it
15 in some way. And I think to separate the copyright from the
16 album and read it out of his interest in is a contortion
17 that I think is not logical here and it's not a plain
18 reading of the forfeiture order.

19 What you really are suggesting is that there's
20 some superseding general principle of copyright law or
21 property law or intellectual property law that should
22 somehow undermine what seems to me is the plain meaning of
23 the forfeiture order. But maybe there's case law saying
24 where a forfeiture order is less precise than it needs to
25 be, it doesn't -- it can't be enforced in a broader, you

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1 know, unspecified way.

2 But we'll save that for another day, because the
3 relevance of that to the interpretation of irreparable harm
4 to me is minimal, because I am really just sort of staring
5 at the cold hard facts that are on the record before me and
6 I don't see anything that really convinces me that there's
7 been such dissemination of the actual or disclosure of the
8 actual formula -- I'm going to call it that just to make
9 life easier -- which is the recording, the ability to
10 actually play it and perform it for someone else, such that
11 the plaintiff can't demonstrate irreparable harm if
12 Mr. Shkreli were allowed to broadcast his or distribute his
13 formula and recordings of it, assuming he has them.

14 So let me just say this: I do appreciate your
15 argument and I certainly will consider all of your arguments
16 more fully, because I think they go more to the merits of
17 the claims themselves and whether they should be dismissed
18 or have been sufficiently stated or are even legally
19 cognizable. Those I'll listen to. But for now, I don't
20 think they bear on the question of irreparable harm.

21 That being said, and I don't want you to spend a
22 lot of time unnecessarily chasing down facts, even if I were
23 to accept that there are 5,000 CDs that Mr. Shkreli
24 distributed back in 2015, I really would need to see
25 evidence that there's some greater dissemination of it or

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1 availability of it, really, that would destroy the value
2 that the plaintiff is claiming that is not quantifiable for
3 purposes of damages, because fundamentally this is a unique
4 piece of work and it even goes beyond some of the artwork
5 that was discussed in other cases, because in artwork, you
6 do display it. That's the value of it. There's no magic
7 formula. I guess you get into how someone paints it, but
8 that's not really what's the value of the painting.

9 This is different, and I think it's different
10 because the playing of it is the performance, the showing of
11 it, but it's the recording that in some way is the thing
12 that has to be kept secret.

13 MR. DYKEMA: May I make one more small point?

14 THE COURT: Yes.

15 MR. DYKEMA: Again, with respect to these factual
16 issues, if the Court would like us to, we'd be happy to
17 submit evidence or have an evidentiary hearing.

18 I'd like to talk really in closing about my last
19 argument, which is about whether the -- again, whether or
20 not the damages here are quantifiable or addressable in
21 money damages. Again, it's an extremely important fact in
22 going to whether there is irreparable harm. Frankly,
23 contrary to what was in the plaintiff's papers, I think the
24 damages here are easily quantifiable in dollar numbers and
25 such could be addressed by ordinary damages. I think

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1 there's two -- I mean, I'm not trying to make their damages
2 case for them, but I just want to outline two ways the Court
3 could go about it.

4 One is that as the plaintiff suggested in the
5 papers and early in oral argument, they paid approximately
6 \$5 million for the record. To me, that's a very
7 straightforward number. You know, if he damaged them, he
8 damaged them sort of no more than this \$5 million amount.

9 There's another possibility. And this wasn't in
10 the papers, wasn't in the plaintiff's briefing, but it was
11 brought up and I'd just like to address it quickly. One of
12 the things the plaintiff is doing, and this is in their
13 public statements, there's a website about it and my
14 adversary discussed it earlier, is that they are selling off
15 what are called NFTs, which give the user certain rights in
16 the album, allegedly. And I might -- I don't have the
17 website printed in front of me because, again, we weren't
18 bringing this evidence.

19 But as I understand the basic scheme, the idea is
20 that the album is supposed to be -- the copyrights of the
21 album are going to be publicly released 88 years from when
22 it was first purchased in 2015, and that every time somebody
23 buys one of these NFTs, the release date of the album
24 advances by a little over a minute. And I'm sure I'll be
25 corrected if I've got this wrong somehow. But --

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1 THE COURT: I think it's 88 second.

2 MR. DYKEMA: That's right, 88 seconds, Your Honor.
3 And the plaintiff has been doing a very brisk business in
4 these NFTs. According to their website as of this morning,
5 they've sold 351,000 of this for \$1 apiece. And so forgive
6 me if I get the math ever so slightly wrong here, but to
7 advance the album all the way to it being released today or
8 around today would require simply the purchase of enough of
9 these NFTs, and then it's public. Regardless of whether
10 it's a trade secret or not, the album is public.

11 So the plaintiff themselves has put an extremely
12 definite dollar amount on this album release, and I
13 calculated on my phone calculator before we got here, it's
14 \$27,952,000. I don't see how the plaintiff valuating
15 effectively all the copies or all the NFTs this album could
16 ever sell before the album becomes completely public and
17 released to everybody can be squared with the plaintiff's
18 argument that the amount of money issued here is
19 unfathomable and can't be ascertained and it can't be
20 computed. It seems that it could be easily computed. They
21 themselves have put a price on it.

22 THE COURT: But you have to admit that that's only
23 one way in which they can monetize this, right? If they
24 decided instead to host a million small listening parties,
25 they could make a lot more, possibly, than 27 million, or

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1 some number that we can't calculate right now.

2 The question is, there is probably potentially an
3 infinite demand for listening to this album. I mean, I have
4 to confess, I'm not a Wu-Tang Clan fan like you are, but
5 that's I think where it becomes less knowable. And it's
6 also about the experience of getting to see it in certain
7 settings, because the plaintiff certainly isn't limited to
8 selling off these NFTs into perpetuity until we reach, you
9 know, the date upon which the album becomes disclosed, or
10 the expiration date, if you will. And if they chose some
11 other way, how are we going to calculate that?

12 MR. DYKEMA: I would agree, Your Honor, that
13 they're not limited to only selling it that way, but they
14 have committed themselves to this plan, and I believe it
15 would be a fraud on their existing customer base if they
16 were to stop that plan.

17 THE COURT: Why? They just say we decided to
18 discontinue this plan, and if you want it hear it, you've
19 got to sign up to go to the Bahamas and pay \$2 million or
20 something like that to sit in a room and listen to it. I
21 mean, I wouldn't, but that's a possibility, right?

22 MR. DYKEMA: What would happen to the 351 -- I'm
23 sorry, it's not \$351,000 -- the 40,000 people who have
24 purchased it, purchased one of these NFTs in reliance on the
25 fact that it would someday be released or that they could

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1 buy the rest of the NFTs and release it?

2 So what I'm trying to say, Your Honor, is that
3 while I completely agree with Your Honor that they could
4 host other listening parties, they could sell tickets, so on
5 and so forth, this \$27 million figure, in our view,
6 unquestionably is an absolute cap on the damages. The
7 damages cannot possibly be more than this amount because if
8 they were to be more than that amount, anybody could just
9 buy out the rest of the NFTs and the album becomes public
10 and there's no injustice, there's no trade secret, there's
11 no anything anymore.

12 THE COURT: Pardon my ignorance about the NFT.
13 Can someone keep listening to the NFT once they have it? In
14 other words, what is the NFT? It's not an actual recording
15 of --

16 MR. COOPER: Just the ownership. It's like a
17 stake in it.

18 THE COURT: I see. So they can't sit there and
19 listen to the album through the NFT?

20 MR. DYKEMA: Correct.

21 MR. COOPER: No, because it's encrypted.

22 THE COURT: Oh, that's right, it is encrypted.
23 And it doesn't become unencrypted until everybody
24 collectively buys enough or enough are sold that the 88
25 years gets diminished to now.

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1 MR. COOPER: Right, right, which is a long time.

2 THE COURT: Well, then I think Mr. Dykema has a
3 point. It does seem to me they are committed to at least
4 that plan because they've promised those people who bought
5 the NFT that they're going to continue to sell these, right?
6 So at some point the encryption won't prevent these folks
7 from listening to it. Or whatever, you get rid of the
8 encryption so they can listen to it.

9 MR. COOPER: But that doesn't preclude them from
10 doing other projects with it. I mean, I couldn't sit here
11 telling you all of the projects that a foundation in digital
12 collectives that has rare art -- I had no idea they were
13 going to do it this way.

14 THE COURT: Right.

15 MR. COOPER: They may combine it with other pieces
16 that they have, too.

17 THE COURT: Well, your argument is it's a floor,
18 not a ceiling for the amount of damages.

19 MR. COOPER: Absolutely.

20 THE COURT: It's a minimum that they can expect to
21 get from it because it has the specified sunset period.
22 They have to stick with it for those people who have
23 invested, but they can do other things.

24 MR. DYKEMA: Respectfully, Your Honor, right now
25 if my client or anybody else had the funds, they could buy

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1 up all these NFTs for \$27 million and the album would become
2 public and this case would go away.

3 THE COURT: Right. But in the interim, you could
4 hypothesize it will happen tomorrow that someone decides to
5 spend that much money.

6 MR. DYKEMA: Sure.

7 THE COURT: But the plaintiff's argument is but
8 until that moment happens and all of them get bought out, or
9 enough of them, they could do a myriad of other things to
10 monetize this.

11 MR. DYKEMA: I agree, Your Honor. We're not
12 arguing that we need to have evidence or anything else on
13 damages. We think the plaintiff's whole case is flawed, and
14 we'll get into that in the future.

15 What I'm saying is that with respect to the
16 irreparable harm analysis, because the plaintiff has put a
17 price on the work, the harm is not unquantifiable, and
18 therefore it's not irreparable.

19 THE COURT: I don't agree with that. They have
20 put a price of part of how they are monetizing it. I think
21 we can all agree on that, and it could be as much as
22 \$27 million. But as I said before, that seems to be a floor
23 and not a ceiling. You say it's a cap, but it's not because
24 they're not precluded from using the album in countless
25 other ways to make money.

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1 MR. DYKEMA: Fair enough, Your Honor. Again, the
2 issue is not whether their damages case is already sort of
3 wrapped up in a bow and done. Their damages case is in all
4 kinds of copyright issues and there are difficulties in them
5 and evidentiary issues and so on. That's a murky area of
6 how the case is going to happen.

7 All I'm saying is that the damages flowing from
8 the sort of public release of the album, releasing it from
9 their control and allowing them to no longer have any
10 control over its dissemination, that has been quantified by
11 this NFT. That's my only argument. It's a small argument,
12 but I don't think that you can say the damages are not
13 quantified -- not you, Your Honor --

14 THE COURT: I understand your argument. I just
15 don't happen to agree with you.

16 Did you want to say anything further, Mr. Cooper?

17 MR. COOPER: Yes, I want to say a few things, Your
18 Honor. I mean, that was a long argument and so much of it --

19 THE COURT: Let's just pause for one second. I
20 want to check on our court reporter.

21 (Pause in proceedings.)

22 THE COURT: Okay. Go ahead.

23 MR. COOPER: That was a long argument. Most of
24 those points were not in the papers, the 11-page opposition.
25 Most of the points are about merits. I think it's a bit of

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1 a subterfuge because the irreparable harm here with this
2 unique object is pretty factually and legally supportable.

3 So I think the issue that you raised on unjust
4 enrichment is accurate, even if you don't want to accept the
5 trade secret argument which is merit based and they didn't
6 argue. Also tortious interference with agreements. If they
7 start broadcasting this album, our ability to sell it the
8 way we're selling it now is also going to be diminished, or
9 the rights that the holders have that they paid for is going
10 to be diminished.

11 So you have two common law claims that would give
12 you a basis for the irreparable harm.

13 THE COURT: And the tortious interference that
14 you're alleging is between plaintiff and their customers?

15 MR. COOPER: Their customers. Their ability to
16 sell it.

17 THE COURT: Okay.

18 MR. COOPER: As far as this copyright and that
19 they withheld it, despite the fact that there is zero
20 evidence of that, the forfeiture order not only talks about
21 interest, which you identified and spent time on, it also
22 talks about the proceeds, all proceeds traceable thereto,
23 which would absolutely, if there's any doubt, encompass any
24 ability he has to receive money in connection with this in
25 the form of a copyright or other ways. That's in paragraph 4.

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1 THE COURT: Let me just say this. And again, this
2 is for a later date because it's not going to affect my
3 ruling. But with respect to the tortious interference
4 claim, though, remember that there is a requirement that the
5 alleged prospective business relationship be with a specific
6 third party. So I don't know if you can broadly say all of
7 our potential customers --

8 MR. COOPER: Well, there's also tortious
9 interference with prospective relations is based on malice,
10 and I think we clearly have malice here because if you read
11 his social media posts, he's saying they blocked me, screw
12 them, I'm going to do this now and calling us all sorts of
13 names. There's no question that this individual is
14 motivated by malice.

15 There are a lot of ironies in this argument.
16 Basically what counsel was saying is, I'm using their words.
17 No, they're not; they're using Shkreli's words. And what we
18 did is in our Complaint and in our papers, we said to the
19 Court this is what he's saying. I'm not a hundred percent
20 sure if everything he says is accurate. Frankly, I'll tell
21 you it's probably not because if you read all his postings,
22 he says a lot of things in there that aren't accurate. The
23 crass reference that he made, did that really happen? The
24 criminal prosecution, was that really a witch hunt like he
25 says? He says a lot of things.

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1 But instead of putting him on the stand or putting
2 in an affidavit from him on a motion that was filed two and
3 a half months ago, they just point to the Complaint. So if
4 they wanted to make these arguments -- then they keep saying
5 we need an evidentiary hearing or they'll come out with the
6 merits, they could have opposed this with evidence and they
7 didn't do it.

8 The other irony is they're basing this all on his
9 wrongdoing. These posts all post-date the forfeiture. He
10 wasn't supposed to have this. So they're basically saying
11 that, you know, it's too late, you know, he did violate the
12 order, he did improper things, but as a result of that
13 they're not really harmed. First of all, that's not true
14 because the distribution was never widespread, and there's
15 nothing in the Complaint or the record that said there was a
16 widespread distribution of this. So --

17 THE COURT: Well, I have to say the fact that
18 351,000 people are spending \$1 -- I know it's not a lot --
19 suggests to me that they can't get the album off the
20 internet as you're saying.

21 MR. COOPER: I was going to make that point too.
22 I picked up on the words they're doing "brisk business."
23 Well, they wouldn't be doing brisk business if this wasn't
24 readily available to people.

25 So he has no rights to this. He just has no

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1 rights to it. He was supposed to forfeit all of it. He
2 cannot rely on his bad acts as a justification for denying
3 us irreparable harm. This is equitable relief. You said it
4 in connection with the unjust enrichment and it's also in
5 connection with irreparable harm. He's a bad actor, and
6 everything they're relying on are his words. They could
7 have put in an affidavit saying I, Martin Shkreli,
8 distributed this to 10,000 people, here's the evidence, full
9 album. I don't think that would have -- even 100,000
10 people. They could have done that, but they didn't do it
11 because who knows what is true and is not true here. But
12 clearly they didn't deny it, okay?

13 So I think that it's inappropriate to rely on our
14 recitations of what Shkreli said in social media posts
15 without putting Shkreli's actual words to the test.

16 Let me just see if I have anything else here.

17 (Pause in proceedings.)

18 MR. COOPER: Final point, and I'm picking up on
19 something Your Honor said, even if there were some
20 distributions, even if there was -- if some people have the
21 whole album. First of all, Shkreli did not have the right
22 to do that. He did not have the right to publicly
23 distribute this. And even if he did, he lost all those
24 rights when he forfeited the album. But as we are here
25 today, there is potentially some of this in the marketplace.

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1 There's no evidence that there's a whole 2 hours and
2 11 minutes in the marketplace, and there's certainly no
3 evidence that this is widely distributed.

4 Going forward, there will be irreparable harm,
5 even if there are some bits of this, snippets of this in the
6 marketplace. There is no question that, one, he shouldn't
7 have this; period, full stop. He just should not have this
8 and he knows it. Secondly, that if he continues to do what
9 he's done and has threatened to do, the \$4 million that we
10 spent and our ability to monetize -- the \$5 million we spent
11 is going to be seriously harmed.

12 None of the three of us, I would submit, can say
13 what an NFT company is going to do to commercialize and
14 monetize this asset. This is a very new, novel, unknown
15 area. It's creative. I don't know that any of us would
16 predict that they did it the way they did it with that
17 launch, which is extremely innovative and new.

18 So there is just no question. I think this is the
19 quintessential irreparable harm case. A unique object that
20 clearly he should not have and that is going to cause us to
21 be unable to fully decide when, where, and how to distribute
22 it.

23 (Pause in proceedings.)

24 THE COURT: With all due respect to both sides'
25 arguments, and I fully do appreciate your arguments,

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1 Mr. Dykema, and I'm saying this because I'm about to issue
2 the preliminary injunction that's requested in large part.
3 I'll just summarize my findings because I think our
4 discussion has been quite fulsome and I think has certainly
5 revealed my analysis and reasoning on these various issues.

6 As everyone knows, a party seeking a preliminary
7 injunction must establish first irreparable harm. Second,
8 either a likelihood of success on the merits or sufficiently
9 serious questions going to the merits of its claims to make
10 them fair ground for litigation. Third, a balance of the
11 hardships tipping decidedly in favor of the moving party,
12 which would be plaintiff here. And fourth, that a
13 preliminary injunction is in the public interest. I'll cite
14 *Connecticut State Police Union v. Rovella*, R-O-V-E-L-L-A,
15 36 F.4th 54, and the jump site is 62, that's Second Circuit
16 2022.

17 As both parties acknowledge, the showing of
18 irreparable harm is perhaps the single most important
19 prerequisite, and the moving party must show that the injury
20 is likely before the other requirements will be considered.
21 *Kamerling*, K-A-M-E-R-L-I-N-G, *v. Massanari*,
22 M-A-S-S-A-N-A-R-I, 295 F.3d 206. The quote comes from page
23 214, Second Circuit 2002 case. And as the parties also are
24 aware, irreparable harm cannot simply be theoretical, but it
25 must be imminent and concrete.

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1 Now, here the big debate has been about whether or
2 not there can be some is quantifiable compensation or
3 damages calculated, but I do find, based on the record
4 before me, that here it would not be possible to do so and
5 that any calculation or that calculating the damages would
6 be inadequate.

7 I do find that this case is almost on all fours
8 with the *Paisley Park* case that we talked about earlier
9 relating to Prince's unreleased recordings, and there were
10 ten of them, ten songs that were not released. I find the
11 reasoning there persuasive on the fact that the plaintiff
12 had stated irreparable damages because there's something
13 that's impossible almost to calculate about the right to
14 control the when, where, and how the trade secret or the
15 alleged trade secret or work of art would be performed or
16 disclosed.

17 Now, I'm not finding, as I mentioned earlier, any
18 presumption of irreparable harm based on the trade secret
19 statute because, as I said before, I think I would have to
20 make a finding that the album is a trade secret, and I'm not
21 prepared to do that at this time in order to apply the
22 rebuttable presumption.

23 Then the second element is likelihood of success
24 or serious question. And here I find that there's at least
25 a serious question going to the merits of plaintiff's trade

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1 secret claim, misappropriation of trade secret claim and
2 unjust enrichment.

3 I am not making any finding with respect to the
4 other two claims, the violation of the forfeiture order and
5 tortious interference. I've expressed my doubts about those
6 during our discussion. I don't think I need to make a
7 finding as to those because obviously irreparable harm that
8 we're talking about is the same for all of the claims
9 collectively.

10 As I said before in response to Mr. Dykema's very
11 much appreciated and vigorous debate on these issues, I'm
12 not accepting the representations that Mr. Shkreli had the
13 right back in 2015 to disseminate the recordings, nor am I
14 accepting that fact based on his post hoc and
15 post-litigation statements that he did so back then. And
16 I'll tell you in a moment how I might give the defendant the
17 right to reopen this preliminary hearing if there's actually
18 some proffer of actual evidence that I think might change
19 the result.

20 But based on the record before me, I do not have
21 information indicating that there has been wide enough
22 distribution of the actual thing that could constitute a
23 trade secret; the analog or digitized recording of the album
24 itself. Therefore, I still find that the plaintiff would
25 suffer irreparable harm should Mr. Shkreli not be enjoined

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1 from doing so, from making that recording publicly
2 available, downloadable, replicable in some way.

3 And then the third element is the balancing of the
4 equities here. I do find that those equities tipped
5 decidedly in plaintiff's favor. Based on my prior finding
6 about the non-compensable serious injury plaintiff would
7 suffer, that in and of itself would be sufficient to find
8 this factor met.

9 And then looking on the other side, I don't find
10 that Mr. Shkreli would be harmed in any way by not being
11 allowed to post or distribute or publicize the actual
12 recordings that he has, assuming he actually does have them,
13 as he claims, on CDs or in some other format, because I have
14 serious reservations about whether he has a right to hold
15 those by virtue of the forfeiture order.

16 Even if the plaintiff doesn't have a right to
17 enforce the forfeiture order or isn't the beneficiary, that
18 doesn't mean Mr. Shkreli has the right to possess or use
19 those recordings. Quite frankly, my preliminary finding on
20 that, should it be raised in some fashion or should that
21 claim remain viable, is that he does not, because I think he
22 was required to forfeit all of his interests, including any
23 recordings he might have of the contents of the album under
24 the forfeiture order. And, quite frankly I have no doubt or
25 very little doubt that Mr. Shkreli understood that, but

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1 didn't want to comply.

2 But that's not relevant to me here other than to
3 say I don't find that Mr. Shkreli has some clear right to
4 use the recordings that he has or doesn't have and he won't
5 be harmed because it's not clear to me that if he has used
6 them, that he's used it in a way to make any profit or
7 somehow benefit himself so significantly so as to outweigh
8 the harm the plaintiff will suffer.

9 And then lastly, I do think it's in the public
10 interest to prevent Mr. Shkreli from disseminating the
11 recordings if he has them because I do believe there is an
12 interest in vindicating the Court's authority to have
13 forfeited those, or required him to forfeit those. I'm not
14 foreclosing some interpretation that suggests he wasn't
15 required to, but it seems pretty clear to me at this moment
16 that my reading of the forfeiture order is that he was not
17 supposed to keep any interest in that album, and that would
18 include recordings and copyrights which he still claims he
19 has, and that I don't agree with either. So I think it's in
20 the public interest to vindicate the Court's authority to
21 impose such orders and not to allow Mr. Shkreli to flout the
22 Court's forfeiture order.

23 I also think there's a value in protecting what is
24 alleged to be a trade secret that was sold to the plaintiff
25 and not to allow that to be flouted, those protections to be

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1 flouted for Mr. Shkreli's benefit or just out of spite or
2 malice, if that's his motivation, or that is what appears to
3 be his motivation.

4 So I am enjoining Mr. Shkreli from using,
5 disseminating, or selling any interest in the album, that
6 would include any copyrights, any recordings, the data, the
7 files that make up the album, or the contents of the album,
8 or in any way causing further damage to plaintiff respecting
9 the album. One has to be somewhat careful, I guess, because
10 he might be able to make statements, I guess, that it's a
11 crappy album, I guess he could do that if he wanted to.
12 He's the one person who has heard it. I don't think I could
13 prevent him from making free speech statements about the
14 quality of the album if he wants to. But what I'm talking
15 about is in some way using the data that he retained from
16 the album in some way to cause damage to the plaintiff with
17 respect to the album. So I'm focused on his dissemination
18 of it.

19 I did not say possessing it, though. I'm not
20 enjoining him -- or let me be more clear. I'm not enjoining
21 his mere possession. What I am going to require is that he
22 turn over whatever copies he has to his lawyers to hold
23 during the pendency of this case, or unless I order
24 otherwise. I know that plaintiff asked for the seizure and
25 disgorgement of his copies of the album. I'm not prepared

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1 to do that yet, but I also do not trust that Mr. Shkreli
2 will follow any order enjoining him from distributing them,
3 and this is based on the history that we discussed during
4 the course of the criminal trial where he violated the terms
5 of his supervised release, he also violated the terms of his
6 bail, causing Judge Matsumoto to revoke it based on a
7 hearing which investigated or explored the allegations that
8 Mr. Shkreli was in some way making threatening posts as to
9 Hillary Clinton when she was a candidate for president.

10 I've read the materials relating to that, to the
11 Government's motion to revoke bail. Bottom line is Judge
12 Matsumoto found that there was enough to find that he
13 presented a danger to the community such that he should be
14 remanded after having been on bond for a period of time.

15 Mr. Shkreli's repeated comments in social media
16 also indicate to me that he is someone who is quite
17 impetuous, volatile, spiteful, and vindictive. And so I
18 have some serious concerns that he would violate an order
19 that enjoins him or prevents him from disseminating what he
20 claims are copies he has of the album.

21 I will however, though, allow for his lawyers to
22 take possession of those, and I'm going to ask you to file a
23 letter at some point certifying that you've done so. So
24 it's incumbent upon you to get your client to comply with
25 you and turn over all copies in whatever format he has to

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1 you so that he's not able to distribute those in any way.

2 Now, there's another aspect of this request which
3 is to order an inventory, an accounting of the copies of the
4 album that Mr. Shkreli retained and the individuals to whom
5 he distributed the data and files and any attendant profits.
6 I am going to order that also because I also think it
7 relates in part to the defendant's claim that somehow there
8 has been some distribution already that destroys any
9 argument or any claim, rather, of irreparable harm. So I
10 think this is something that the defendants should be doing
11 anyway, is getting to the bottom of these claims he's made
12 now about having previously distributed actual CDs of the
13 album. I've expressed my skepticism about that in large
14 part because they've never surfaced, and that seems
15 improbable, if not incredible, to me in the eight
16 intervening years or so, nine intervening years.

17 So I am going to order that inventory. We should
18 try to figure out the mechanics of that. It would come, I
19 guess, via the counsel providing that inventory.

20 Now, this gets me to what I will say, which is
21 that, Mr. Dykema and Mr. Krimnus, if you decide you have
22 some evidence that you think is relevant to the question of
23 irreparable harm along the lines that we discussed and
24 relating to 2015 or pre-2018, which is when the forfeiture
25 order was issued, dissemination of the copies of the actual

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1 album, you know, recordings, you can seek to reopen this
2 preliminary injunction hearing or to present that evidence.
3 But I would like some kind of affidavit or something by way
4 of proffer so that I understand what we're talking about,
5 and I may or may not allow a reopening based on the
6 submission I receive. But that's why I think your
7 investigation is aligned with getting an inventory, as well.
8 It might end up serving your purpose with respect to either
9 altering or eliminating the preliminary injunction.

10 So that's my ruling.

11 Is there anything I missed from the plaintiff's
12 perspective that I should address?

13 MR. COOPER: No. I do have three clarification
14 questions.

15 THE COURT: Yes.

16 MR. COOPER: And I think the first one is
17 self-evident, that Mr. Shkreli is to relinquish all copies
18 to his counsel.

19 THE COURT: Yes.

20 MR. COOPER: He is not to retain any of them,
21 correct?

22 THE COURT: That's right. In whatever form,
23 wherever they are, he's got to give them to his lawyers for
24 safekeeping.

25 MR. COOPER: The second question I have is: The

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1 inventory or the accounting I would request be in the form
2 of an affidavit because I believe that's the way it's done
3 on the CPLR. So I would want that.

4 THE COURT: Okay.

5 Any objection to that, Mr. Dykema?

6 MR. DYKEMA: No, Your Honor. I have a logistical
7 question.

8 THE COURT: Okay. With respect to that affidavit?

9 MR. DYKEMA: With respect to turning over the
10 copies to counsel, which is that with respect to physical
11 copies, USB sticks or CDs or whatever, crystal clear. My
12 understanding is these are computer files that might be on
13 Mr. Shkreli's personal computer. Is --

14 THE COURT: Remove the hard drive. He should get
15 himself a new hard drive.

16 MR. DYKEMA: Okay. Understood.

17 THE COURT: I mean, listen, I'm no computer
18 expert, but I want the actual physical recording of it. If
19 it's in a hard drive on his personal computer, then he has
20 to take it out and give it to you, or I guess he could
21 delete it from his own computer.

22 MR. DYKEMA: That was exactly my question, Your
23 Honor. I wouldn't want to tell him to delete it and then
24 have a spoliation issue.

25 THE COURT: No. I mean, if he deletes it, he'll

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1 copy it first on to some external hard drive for you, or
2 whatever format you choose, a stick. I don't know how large
3 the file is.

4 MR. DYKEMA: Yes, Your Honor.

5 THE COURT: But you could put it on an external
6 hard drive, I think it's easier probably just to -- although
7 he probably has a lot of things on his hard drive. So maybe
8 the better course is to remove it from his hard drive,
9 transfer it on to one that you hold and then take possession
10 of that. And then you're going to need to confirm as an
11 officer of the court that he removed it from his computer.

12 MR. DYKEMA: I'll do my best, Your Honor.

13 THE COURT: I'm putting you in a difficult
14 position, I know, but obviously I want to make sure that
15 there's some monitoring of his compliance and he has to
16 understand that, you know, his noncompliance could really
17 put him into some serious trouble as far as I'm concerned.

18 MR. DYKEMA: One more question with respect to the
19 inventory, Your Honor.

20 THE COURT: Yes.

21 MR. DYKEMA: Is this an inventory of the copies in
22 his possession, or is this an inventory of distributions or
23 whatever that he's made?

24 THE COURT: Both. So copies in his possession and
25 any that he's distributed to anyone else. And that's why I

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1 think it goes to your issue about distribution. If, in
2 fact, he distributed 50 CDs, I want to know where they went
3 to, and he has to provide names and addresses. You can
4 include redactions if you'd like and file a sealed copy, if
5 you have some concern about people's privacy, and then file
6 a redacted version publicly. So maybe put it in an
7 attachment or something.

8 MR. COOPER: I think Mr. Shkreli should also be
9 required to put in an affidavit indicating that he has
10 turned over everything. I don't want to put his counsel in
11 jeopardy, and I want something definitive where if it's
12 violated --

13 THE COURT: There's some consequence.

14 MR. COOPER: -- there's a consequence.

15 THE COURT: I would actually ask that it be under
16 penalty of perjury that he submit a declaration attesting to
17 who he gave it to. I agree that I don't want to put you in
18 the position of attesting to facts, although lawyers submit
19 declarations all the time, as happened here, but those are
20 typically things like, this purports to be a CD or something
21 like that. If he's attesting to a fact that he gave it to
22 you on X date in X format and what he gave them, he should
23 be the one attesting to it under a penalty of perjury so
24 that I can rely on it in some way, if I'm going to rely on
25 it, either for purposes of reopening the preliminary

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1 injunction hearing or simply for purposes of moving this
2 case forward.

3 MR. DYKEMA: Understood, Your Honor. I'm
4 certainly not a fact witness as to what Mr. Shkreli may or
5 may not do, but I'll -- I understand what you're asking for.

6 THE COURT: So stress the importance of his
7 truthfulness, because there will be a consequence if he
8 signs a declaration under penalties of perjury. Okay?

9 MR. DYKEMA: Yes, Your Honor.

10 MR. COOPER: Can we put a time from on it? I know
11 this will take a little time, so I don't want to necessarily
12 make it too tight.

13 THE COURT: How about the end of September, would
14 that suit everyone's purposes?

15 MR. COOPER: For both, the provision of all of the
16 copies to his counsel and the --

17 THE COURT: No, that I'd like to have happen
18 sooner. So let's have two different dates. The inventory
19 I'm less concerned about. But I assume that the inventory
20 in some ways will end up being created around the time the
21 copies are being seized, because I assume the next thing
22 you'll need to do is sit down with your client and explain
23 what's happening.

24 So why don't we do this: Within two weeks I want
25 you to retain all the copies. I mean, I have a little bit

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1 of a concern that this might be -- you know, why don't we
2 make it a week. It's not that difficult. You know, he has
3 them. You've just got to go over there and get them. So
4 before Labor Day. I don't want there to be too much time.
5 So a week from now is next Friday. So that puts us at the
6 31st, I think.

7 THE COURTROOM DEPUTY: 30th.

8 THE COURT: So by the 30th I want you to submit a
9 letter to me indicating that you've taken possession of all
10 copies and that he has no copies, based on his
11 representation to you, of any of the albums, recordings, or
12 contents. Okay?

13 MR. DYKEMA: Yes, Your Honor.

14 THE COURT: And that you will hold on to them
15 during the pendency of this case.

16 And then by the end of September, I would like to
17 have that accounting or inventory. You could submit it
18 sooner if in some way it supports your request for a
19 reopening of the preliminary injunction hearing.

20 MR. DYKEMA: Yes, Your Honor.

21 I have two more really quick questions.

22 THE COURT: Please.

23 MR. DYKEMA: So I think I get this. Will there be
24 a written order?

25 THE COURT: No, this is it. So if you want to get

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1 a copy of the transcript --

2 MR. DYKEMA: We will.

3 THE COURT: -- order it from our court reporter.

4 MR. DYKEMA: There's two sort of evidentiary
5 issues as we investigate this case and speak with our
6 client.

7 One is on this issue of investigating to see
8 whether there are copies available on the internet. I don't
9 want to run afoul of any copyright violations in
10 investigating or downloading these things. If plaintiffs
11 have no objection, could it be made clear that like us
12 attempting to download the files from the internet, if
13 they're out there and already exist, is not going to be some
14 sort of actionable violation?

15 THE COURT: I think that's clear, because you're
16 doing it at my instruction simply to preserve or remove from
17 his access those files. You know, the only way to do it,
18 unless you took physical possession and put them in your
19 office, I mean, this is what you have to do. So I don't
20 think there can be any construction that you're violating a
21 forfeiture order or you're violating any trade secret, I
22 guess.

23 MR. DYKEMA: I understand, Your Honor.
24 Specifically I believe that the album is available on
25 BitTorrent.

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1 THE COURT: Yes.

2 MR. DYKEMA: So I'd like to go and see if I can
3 download it on BitTorrent and I don't want to be --

4 THE COURT: Oh, that's fine.

5 MR. DYKEMA: Okay.

6 THE COURT: Yeah, that's fine.

7 MR. DYKEMA: And one other sort of related
8 question is: So that there's no confusion about whether
9 whatever files we obtain from Mr. Shkreli or from the
10 internet are genuine, and I guess we could wait for this in
11 discovery, but could we get a copy of the relevant files
12 from the plaintiff to be able to make this comparison?
13 Because I myself haven't heard the album and I don't --

14 THE COURT: No, I know, but you're going to have
15 to turn it over to them and then their client will confirm
16 for you, because I'm not going to let you have a copy of it.
17 And plus they don't know what is purportedly on BitTorrent
18 or in his possession. So they would end up having to give
19 you the entire album, right? That's what you'd be asking
20 for. I know you're a big fan, but this is not a way to get
21 it.

22 MR. DYKEMA: I understand, Your Honor. I
23 understand, Your Honor.

24 Ordinarily this would happen in discovery anyways
25 because if we approach the issue of whether there's been an

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1 infringement or a copying, we'd be entitled to have either
2 ourselves or an expert listen to both copies and I wouldn't
3 want to have a chain of custody issue like where I have to
4 submit it to them for them to tell me how they see the
5 evidence.

6 THE COURT: Mr. Cooper?

7 MR. COOPER: I think they should just provide it.
8 I don't think there's going to be a big mystery about
9 whether or not this came from the album or didn't come.
10 Mr. Shkreli's going to tell them: This is one of the things
11 I distributed. I don't think you need to do a side by side.
12 I don't want to relinquish any possession given what's
13 happened. If there's a question down the road, we can
14 address it.

15 THE COURT: At some point in discovery, though,
16 aren't you going to have to provide a copy of the album to
17 them?

18 MR. COOPER: I don't know. And it might be
19 attorneys' eyes only. I don't know.

20 THE COURT: Well, that's an interesting question.

21 All right. I think for this purpose, you don't
22 need to get a copy of the album. Our fabulous Magistrate
23 Judge will resolve later down the road the discovery
24 dispute, if there is one, about how you actually get access
25 to the album. But why don't you talk to your client, have

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1 him tell you all the copies he's made. That's sort of the
2 relevant part. He may be overly inclusive if he's forgotten
3 where he got some of it from. But you can obviously compare
4 it to anything that's publicly available, so you can
5 compare those that aren't uniquely on that album. And the
6 BitTorrent, if you can find it, you can ask your client if
7 that's the one that was on the album before.

8 So let's proceed in that fashion, for now.

9 I wanted to clarify one thing about the schedule.

10 So the September 30th should include an affidavit
11 from Mr. Shkreli by way of an inventory. In other words,
12 here are all the people I claim I distributed to, on dates,
13 if he has it, and what their names and addresses are.

14 At this point I don't know if there's any reason
15 to have any kind of an affidavit from the attorney, I guess.
16 The only affidavit or at least some statement from you, it
17 can be in a letter, is that I took possession of files from
18 Mr. Shkreli that he advised me were all of his copies of the
19 album's contents and I'm storing them.

20 THE COURTROOM DEPUTY: August 30th, not
21 September 30th. I'm sorry.

22 MR. DYKEMA: There's two different affidavits.

23 THE COURT: Yes. August 30th is the one for the,
24 yes, taking possession, that comes from you, Mr. Dykema.
25 And it doesn't have to be an affidavit. I'll accept your

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1 representation as an officer of the court in a letter
2 format. And then the affidavit from Mr. Shkreli is due on
3 September 30th. That's the inventory.

4 MR. COOPER: Right, but there's another affidavit
5 that would be due August 30th which would be from
6 Mr. Shkreli, essentially a one-paragraph affidavit saying
7 I've provided my counsel with all my copies, versions,
8 et cetera of this, again, so Mr. --

9 THE COURT: Right. So there's some consequence if
10 he lies.

11 MR. COOPER: So Mr. Dykema's not at risk and
12 there's some clarity and there's some consequences.

13 THE COURT: Okay. I think that's fair. I do want
14 Mr. Shkreli to understand that he cannot manipulate you or
15 in some way use you to put forth inaccurate information. So
16 do have him submit a -- it could be a very simple affidavit
17 saying I have turned over all files in any form. And this
18 might be things that are stored in a cloud? I don't know if
19 that's possible. I assume it is. All files I have in
20 whatever format and in whatever physical or digital location
21 to my attorney and I do not have any presently accessible to
22 me or something like that. Okay?

23 MR. DYKEMA: Understood, Your Honor.

24 THE COURT: Because here's a potential concern for
25 what it's worth is that if he actually did distribute CDs to

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1 other people, I want him to understand he can't go and
2 access those from them even after he turns over all his
3 copies to you. Do you understand what I'm saying?

4 In other words, he's not to possess any copies
5 after he turns over everything to you. So he can't go to a
6 friend, if he actually sent a CD to a friend, and go and get
7 that. Okay?

8 MR. DYKEMA: I understand.

9 THE COURT: So fashion some affidavit and
10 hopefully that will be sufficient. And that should be
11 turned in with your letter certifying that you've taken
12 possession of all of his files on August 30th. And then on
13 September 30th, a separate affidavit from Mr. Shkreli
14 indicating an inventory of everyone who he has supposedly
15 provided the digital cloud to. August 30th, and then
16 September 30th.

17 MR. COOPER: One last point. On the
18 September 30th affidavit, we'd also like to have a statement
19 as to what proceeds, revenues he's received in connection
20 with any distribution of the album, that was in our request
21 and I think it makes sense given the nature of it?

22 THE COURT: Same. So he should indicate if he's
23 made any proceeds from his distribution or playing of the
24 album or its contents.

25 MR. DYKEMA: During what time period, Your Honor?

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1 THE COURT: Since he's had it. Because remember,
2 I mean, in theory he didn't have it all that long before it
3 was supposed to be forfeited, right? He bought it in --

4 MR. COOPER: He bought it in '15.

5 THE COURT: Right.

6 MR. COOPER: He was convicted in -- indicted in
7 '17, and I think the forfeiture order was '21.

8 THE COURT: No --

9 MR. COOPER: It was '18.

10 THE COURT: Right, 2018.

11 MR. COOPER: Right. There was the conviction, and
12 the forfeiture order was later.

13 THE COURT: Was March 2018. So he had it for
14 about three years. I don't know, but I don't get the
15 impression based on what's before me that he was playing it
16 very often or making money from it. It's not clear to me at
17 all he made any money from it. So he should indicate what
18 proceeds he got from any distribution or performing or
19 playing of the album's contents in that declaration.

20 MR. DYKEMA: Okay.

21 THE COURT: So I will issue a preliminary
22 injunction, in other words, an actual order, and that will
23 reiterate that aspect of the injunction.

24 MR. DYKEMA: Thank you, Your Honor.

25 Just one very quick question on the schedule.

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1 THE COURT: Yes.

2 MR. DYKEMA: I haven't spoken a whole lot with
3 Mr. Shkreli. As I sit here right now, I don't think we're
4 going to have a problem meeting this next Friday deadline.
5 But if we do, I just request the indulgence of the Court
6 that we could submit a letter and explain why. I don't know
7 if he's at the beach or whatever. But we'll do our best to
8 hit that deadline.

9 THE COURT: Yes. Do explain if you have to get an
10 extension as to why. Obviously the paramount thing you must
11 communicate to him as soon as you leave here is that he's
12 not allowed to use, disseminate, secret, you know, those
13 recordings if he has any.

14 MR. DYKEMA: Understood, Your Honor.

15 THE COURT: And he's enjoined from using them in
16 any way and the only thing he's allowed to do with them
17 right now is turn them over to you.

18 MR. DYKEMA: Understood, Your Honor. Thank you.

19 THE COURT: Good. Thank you very much. It was a
20 pleasure meeting everyone. So we'll issue the order and
21 then we'll move on to the next phase, which is the motion to
22 dismiss.

23 I might actually dispense with the pre-motion
24 conference requirement. If you folks talk about a schedule
25 for briefing it, because I do think there's going to be a

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1 need to see these arguments, just propose it to me in a
2 letter, because normally you have to file a response to the
3 pre-motion conference request, but let's dispense with that.

4 Thanks, everyone. Enjoy what little remains of
5 the summer.

6 (Matter adjourned.)

7
8 * * *

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10 CERTIFICATE OF REPORTER

11 I certify that the foregoing is a correct transcript of the
12 record of proceedings in the above-entitled matter.
13

14 /s/ Kristi Cruz

15 _____
16 Kristi Cruz RMR, CRR, RPR
17 Official Court Reporter.
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